




CRIMINAL LAW

# private prosecutions

Working Paper 52





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## Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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# CHAPTER ONE

## Introduction

“It is the essence of a crime that it is a wrong of so serious a nature that it is regarded as an offence, not merely against an individual but against the State itself.”<sup>1</sup> In the modern Canadian criminal justice system, adherence to this basic proposition has led to the creation of the office of the Crown attorney or public prosecutor, it being believed that offences against the state should be prosecuted in the name of the state by state officials. These public officials conduct and oversee the vast bulk of the prosecutions of criminal offences in Canada. The residual cases, although comparatively few in number, nevertheless are of some concern to those engaged in the administration of criminal justice in Canada. The rights and standing of a private prosecutor in the prosecution of criminal offences are an issue possessing an importance greater than its modest area of practical operation would indicate.

The role of the prosecutor, whether public or private, is a very special one in any system of criminal justice. This Working Paper seeks to examine and analyse the powers and obligations of the private prosecutor in Canada primarily for the purpose of assessing the desirability of retaining such a function at this point in our legal and social history. Consequently this Working Paper is concerned with the role, both actual and potential, of the private prosecutor in Canada.

For the purposes of this Working Paper, we understand a private prosecutor to be an individual, or group or corporation (other than a public authority) not acting in any public capacity. Although theoretically most prosecutions are “private” in the sense that they are pursued by various public officers who have no powers beyond those possessed by the private citizen, they are not private prosecutions in the sense of the term as used in this Paper.<sup>2</sup>

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1. F. Kaufman, “The Role of the Private Prosecutor: A Critical Analysis of the Complainant’s Position in Criminal Cases” (1960-1), 7 *McGill L.J.* 102, citing *Tremear’s Annotated Criminal Code of Canada*, 5th ed. (1944), p. 1.
  2. Cf. P. Howard, *Criminal Justice in England: A Study in Law Administration* (New York: 1931). At page 3, Howard refers to Maitland: “Professor Maitland thought that it was misleading to speak of the English system as one of *private* prosecutions. ‘It is we who have public prosecutions,’ he wrote, ‘for any one of the public may prosecute; abroad they have *state* prosecutions or *official* prosecutions.’ ”

There has been very little written on the subject of the private prosecutor. In Canada there are only three substantial Papers on this subject.<sup>3</sup> Indeed, remarkably little has been written on the status of the prosecutor generally, whether private or public.<sup>4</sup>

The prosecutor has a pivotal role to play in our adversary system. As we have explained in our Working Papers on *Discovery*<sup>5</sup> and *Control of the Process*,<sup>6</sup> the criminal trial is structured as a dispute between two sides: the prosecutor (usually the Crown) and the accused. The formulation of the legal and factual issues in the dispute and the presentation of the evidence on those issues are the responsibility of the parties, a task that owing to allocation of the burden of proof in criminal trials falls primarily to the prosecution. The trial judge does not play an active role in the definition or presentation of evidence. It is his task to ensure that the rules of procedure are observed by the contestants and to render a decision on the issues before him.

It would be perfectly consistent with the model of the adversary system presented above to state that charging decisions should be solely the responsibility of the Crown. Our law and practice do not, however, present so simple a solution. Responsibility for charging decisions is in fact dispersed in such a manner as to defy either brief description or easy rationalization. In part, the complexity of the present arrangement is a product of history: its retention perhaps represents an instinctive reluctance to bestow upon any one individual or authority the broad powers inherent in the charging process. This is because control of the charging process is of crucial importance. If a person is charged with, and tried for, assault and the evidence proves not assault but theft, he must be acquitted. An offender may only be brought to trial and convicted for the offences specified (or included) in the charge against him. The charge, over which the prosecutor has control, forms the basis for determining all issues in the proceedings. This is an outgrowth of the principle of legality which indicates that no one may be prosecuted except for an offence created by statute or by statutory authority. The corollary of this is that no one may be convicted except for an offence specified in the charge which comes before the trial court.

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3. See: P. Burns, *Private Prosecutions* (1973, unpublished LRCC Paper); Kaufman, *supra*, note 1; and S.H. Berner, *Private Prosecution and Environmental Control Legislation: A Study* (commissioned by the Department of the Environment, September 1972). See also: LRCC, *Criminal Procedure: Control of the Process* [Working Paper 15] (Ottawa: Information Canada, 1976); P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975), 21 *McGill L.J.* 269; and P. Burns, "The Power to Prosecute" in J. Atrens, P. Burns and J. Taylor, eds., *Criminal Procedure: Canadian Law and Practice* (Vancouver: Butterworths, 1981), Chapter V, pp. 8-34.

4. For an excellent and detailed account of prosecutorial authority in Canada see P.C. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986). The classic work in the field has long been recognized to be J.L. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964).

5. LRCC, *Criminal Procedure: Discovery* [Working Paper 4] (Ottawa: Information Canada, 1974).

6. LRCC, *supra*, note 3. Portions of the ensuing discussion in this chapter have been culled from this publication.



In Canada the role of the private individual within our prosecution system is recognized in his ability to bring charges (or in the legal vernacular, to "lay an information") and in his limited and ill-defined authority to conduct the prosecution of certain categories of cases. In the pages that follow, we will discuss the role of private prosecutions within our system and examine the competing policies which affect the shape of potential reform in this area. Also, in order to better assess the specific kind of reform which is necessary, we have devoted attention to the present law governing private prosecutions in Canada today.

As will become evident, it is our belief that a criminal justice system that makes full provision for private prosecution of criminal and quasi-criminal offences has advantages over one that does not. In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring such participation.

Of course there may be, as a matter of policy, offences that owing to their peculiar subject-matter, should not be susceptible to private prosecution. However, this difficulty may be easily resolved in a number of ways; for example, by drafting such offences so as to require a public official (namely the Attorney General) to pursue them, or perhaps by statutorily barring private prosecution of such offences in the absence of specified consent.

Certain kinds of offences may be more likely to inspire a citizen or a group to launch a private prosecution. Offences relating to environmental quality and consumer protection (while not the actual focus of this Paper) are those that most readily spring to mind. In both of these areas we have seen the phenomenon of civic activism. Large groups of people are committed to the enforcement of the values contained in this type of legislation. For reasons which are developed within, it is this type of quasi-crime or regulatory offence that seems most likely to be given a lower priority in the public prosecutor's or Crown attorney's scale of importance. In making this observation we are not thereby denigrating the importance of granting access to prosecutorial opportunities to ordinary citizens in relation to so-called "true" crimes. But we do believe that it is a reasonable speculation that private prosecutions of true crimes will be heavily outnumbered by private prosecutions of regulatory offences. True crimes and the mechanisms for their prosecution within the criminal justice system, however, remain the primary concern of this Working Paper.

We have come to support expanded rights of private prosecution because of the particular view which we take of the optimum role to be played by the victim and citizen in the criminal justice process. In so doing we are mindful of the fact that a private prosecutor will often encounter significant procedural difficulties and expense in choosing to launch or to bring a private prosecution. Undeniably, significant practical problems exist. First among these is that of actually gathering evidence for presentation in court, while another is the possibility of apathy or even antipathy of the Crown agencies that may have material that is relevant to the case which he wishes to pursue.

If the Crown proves to be unco-operative, it is possible that a private prosecutor will not succeed in obtaining the desired material. (We are advised that the usual practice in cases which are pursued privately is for the police investigators to turn their information and files over to the Crown prosecutor's office rather than to provide the aggrieved individual directly with the material.) The Crown attorney then has the responsibility to determine how much disclosure is to be made to any individual who wishes to prosecute a case privately. Accordingly, it is likely to be only the most determined and aggrieved of individuals who will attempt to pursue the criminal law in a private capacity. Given the existing safeguards (which we do not seek to diminish) reflected in the Crown's power to intervene, it is our submission that the private prosecution has a practical, responsible and real role to play in our criminal legal process. This role should be overtly recognized, and as well, formal aspects of it ought to be directly incorporated into the rules of criminal procedure in the *Criminal Code*.

Our conclusions have not been reached in a vacuum. We have examined the comparative experience of other countries and other societies. We have not restricted ourselves to the common law experience, but have examined the position of the prosecutor in both civilian and common law systems. Although the role of the private prosecutor shifts and has different manifestations from jurisdiction to jurisdiction, the weight of the evidence has compelled us to conclude that the private complainant should have a vital role to play in the Canadian criminal justice system. Since we believe that the product of our historical and comparative research is highly relevant to an informed consideration of this subject, we are presenting some of it in an Appendix to this Working Paper. In general we have concluded that the retention and expansion of the right of private prosecution in Canada would respect a value that is reflected in the ideological history of the criminal law itself. Also, we believe that this approach is consistent with the basic principles which ought to activate an effective criminal justice system; namely, economy, accountability and restraint. Moreover, we view private prosecutions as an appropriate adjunct to the fair and humane administration of justice.

For reasons which follow we have concluded that, 'as nearly as possible, the private prosecutor ought to enjoy the same rights as the public prosecutor in carrying his case forward to trial and ultimately to final disposition on appeal. This is a modest proposal but an important one, since it underscores our belief in the value of citizen/victim participation in the criminal justice system and serves to reinforce and demonstrate the integrity of basic democratic values.

## CHAPTER TWO

### The Law Governing Private Prosecutions in Canada Today

The major problem in investigating the law relating to private prosecution in Canada is a real scarcity of authority on the many important questions that arise.<sup>7</sup>

Canadian criminal law is derived from English law in terms of both its substance and its procedure. Therefore, *Criminal Code* subsection 7(2)<sup>8</sup> states that, except as altered, varied, modified or affected by the *Criminal Code* or any other federal enactment, the criminal law of England that was in force in a province immediately prior to April 1, 1955 (the date of the last comprehensive revision of the *Criminal Code*) continues in force. Accordingly, to a considerable extent the old English procedure still holds sway in Canada and "decisions on procedure under the old *Code*, except as they are rendered inapplicable by the provisions of the new *Code*, still stand good."<sup>9</sup>

The question then is whether the criminal law of England with regard to private prosecutions has been altered in the Canadian context by the terms of the *Code* itself or by the Canadian judicial decisions of the last thirty years. The general rule in England is very simple: "Under English law there is ... not the slightest doubt that a private prosecutor could on 19th November 1858, and indeed can at the present day in the absence of intervention by the Crown, carry through all its stages a prosecution for any offence."<sup>10</sup> Having regard to the fact that "there is not clear statutory provision — federal or provincial — which expressly and directly either affirms or denies the right

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7. Berner, *supra*, note 3, p. 29.

8. All references to the *Code* or the *Criminal Code* are to R.S.C. 1970, c. 34, as amended.

9. *R. v. Schwerdt* (1957), 27 C.R. 35, p. 38, *per* Wilson J. (B.C. S.C.).

10. *Ibid.* But even in 1957 when Wilson J. made this assertion, not all such offences were capable of being "carried through": Royal Commission on Criminal Procedure, *Prosecutions by Private Individuals and Non-Police Agencies* [Research Study No. 10] Appendix F (London: HMSO, 1980).

to conduct a private prosecution,"<sup>11</sup> one must then ask, To what extent does the English position apply in Canada? Finding the answer to this question requires analysis of the law with reference to the ordinary criminal process.<sup>12</sup>

## I. Laying the Information

All criminal proceedings are initiated by the laying of an "information"<sup>13</sup> (a technical term referring to a form of criminal charge) pursuant to section 455 of the *Code*. That provision states:

Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice ....<sup>14</sup>

A justice is obliged to receive the information<sup>15</sup> if all the formal requirements are met; if he refuses on the ground that he has no jurisdiction, his decision is reviewable by a superior court, the matter being a question of law.<sup>16</sup>

At this point it is worth while noting that pursuant to section 2 of the *Code*, the term "prosecutor" means the Attorney General or, *where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies*, and includes counsel acting on behalf of either of them; ...." [Emphasis added] Under Part XXIV of the *Code*, which is concerned with the summary conviction procedure which governs minor criminal offences, the term "informant" is defined to include a person who lays an information. In Canada the vast majority of informations are laid by police officers at the behest or complaint of a private individual. This is significant, for the informant need not be a witness to the events constituting the alleged offence. However, he must have reasonable and probable grounds (that is, objectively reliable information) for his belief that it was committed by the accused. No material interest of the informant needs to have been affected to entitle him to lay the information.<sup>17</sup> He or she need not be the victim of the crime. The information may be laid in his or her

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11. Berner, *supra*, note 3, p. 3. There are specific exceptions; see e.g., subsection 40(2) of *The Wildlife Act*, R.S.M. 1970, c. W140, which refers to private prosecution as the mode of enforcement.

12. This process in general terms also pertains to provincial offences and offences under by-laws.

13. Other than "preferred" indictments under sections 505 and 507 of the *Code*.

14. *Criminal Code*, s. 455. The same is true of summary conviction offences as a result of section 723 of the *Code*.

15. Berner, *supra*, note 3, p. 4.

16. *R. v. Meehan (No. 2)* (1902), 5 C.C.C. 312, 3 O.L.R. 567 (H.C.).

17. Berner, *supra*, note 3, p. 4.

own name rather than that of the Crown;<sup>18</sup> and the document need not formally state that it is “for and on behalf of Her Majesty the Queen.”<sup>19</sup>

## II. Appearance by the Accused

Once the information has been laid, the accused is compelled to attend before a court to answer the allegations contained in it. The *Criminal Code* contains provisions which require a justice to hear the informant’s allegations and possibly also the evidence of witnesses where he considers it desirable or necessary to do so before compelling the appearance of the accused by issuing process. He is empowered to issue (a summons or a warrant) or confirm process “where he considers that a case for so doing has been made out, ....”<sup>20</sup>

This power to issue or confirm process has been described as “a matter that is wholly within [the magistrate’s] discretion. Even if the [magistrate] were to make an erroneous determination on the law in exercising that discretion, *mandamus* cannot lie.”<sup>21</sup> Accordingly, a prosecutor is unable to *require*, through resort to judicial review, a justice to issue process to compel the accused’s attendance in court.<sup>22</sup>

It is conceivable that a justice may refuse to issue process after receiving an information from a private prosecutor. The private prosecutor may then either attempt to obtain such process from another justice (using the same information) or by swearing out another information before another justice.<sup>23</sup>

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18. There had been some doubt as to this expressed by Kaufman, *supra*, note 1, pp. 102-13, based on older Québec decisions. But in the decision of the Manitoba Court of Appeal in *Mandelbaum v. Denstedt* (1968), 5 C.R.N.S. 307 (Man. C.A.), after a careful analysis of the case-law, the court concluded that an information could be laid in the name of the prosecutor without reference to the Crown. However, it is an open question whether or not, as a result of this case, the prosecution can be carried on in the name of a private prosecutor alone. See also *Usick v. Radford*, [1974] 1 W.W.R. 191 (Man. C.A.).

19. *Mandelbaum v. Denstedt*, *id.*, p. 313.

20. *Criminal Code*, ss. 455.3(1)(b), 455.4(1)(b).

21. *Evans v. Pesce and Attorney General for Alberta* (1969), 8 C.R.N.S. 201, p. 214, *per* Riley J. (Alta. S.C.).

22. See also: *R. v. Doz* (1968), 5 C.R.N.S. 86 (Alta. S.C.); *Re E.J. Parke* (1899), 3 C.C.C. 122, 30 O.R. 498 (H.C.); *Broom v. Denison* (1911), 20 O.W.R. 30, *aff'd* 20 O.W.R. 244 (C.A.); *Blacklock v. Primrose*, [1924] 3 W.W.R. 189 (Alta. S.C.); and *R. v. Jones, Ex parte Cohen*, [1970] 2 C.C.C. 374 (B.C. S.C.).

23. There is authority to suggest that the same information cannot be taken to another justice (*Barrick v. Parker* (1963), 45 W.W.R. 697 (Sask. Q.B.)) but this view was not taken in the later case of *R. v. Southwick, Ex parte Gilbert Steel Ltd.*, [1968] 1 C.C.C. 356, 2 C.R.N.S. 46 (Ont. C.A.). In this case no reference was made to the *Barrick* decision. This writer agrees with Berner, *supra*, note 3, p. 8, that the approach in the *Southwick* case is preferable, although it is not a real issue since another information can be sworn out by the prosecutor.



### III. The Hearing

#### A. Summary Conviction Offences<sup>24</sup>

All summary conviction offences<sup>25</sup> are dealt with by the procedure laid down in Part XXIV of the *Code*. It is now perfectly clear from the wordings of section 720 of the *Code* that “[t]here is nothing in Part XXIV which bars the basic right, derived from English law, of a private citizen to conduct a private prosecution.”<sup>26</sup> The law was not always so unambiguous.

This was because the definition of “prosecutor” contained in the pre-1985 version of *Code* subsection 720(1) was said to include “an informant or the Attorney General or their respective counsel or agents; ...”<sup>27</sup> The use of the term “or” was believed to contemplate the situation where the Attorney General or his agent was not a party to the proceedings.<sup>28</sup> Section 720 now provides that “‘prosecutor’ means the Attorney General, or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them.”

Under *Code* subsection 736(3), the evidence of the witnesses for the prosecutor must be taken by the summary conviction court where the accused pleads not guilty, and under section 737 the “prosecutor” (as defined above) is entitled “personally to conduct his case” and may examine and cross-examine witnesses himself or by counsel or agent. Since a “prosecutor” includes an “informant,” a private person can personally prosecute the case summarily or prosecute through counsel or an agent.<sup>29</sup>

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24. See: Kaufman, *supra*, note 1, pp. 103-4; Berner, *supra*, note 3, pp. 8-10.

25. These include all provincial offences, summary conviction federal offences and indictable offences triable summarily at the discretion of the prosecutor; see *R. v. Seward* (1966), 48 C.R. 220 (Y.T. M.C.); *R. v. Paulovich* (1966), 49 C.R. 21 (Alta. S.C.). If the prosecutor at arraignment does not indicate his choice, he is deemed to have chosen to proceed by way of summary conviction: *R. v. Mitzell* (1951), 14 C.R. 170 (B.C. S.C.).

26. *Schwerdt*, *supra*, note 9, pp. 40-1, *per* Wilson J. (B.C. S.C.). See also *Re McMicken* (1912), 3 W.W.R. 492 (Man. C.A.).

27. Kaufman, *supra*, note 1, pp. 103-4, points out a limitation existing in Québec whereby, as the result of provincial legislation, it is an offence for persons other than advocates to plead before any court. The term “prosecutor” is also defined in section 2 of the *Code* to include private prosecutors. This definition applies to indictable proceedings.

28. See, for example, *R. v. McIlree*, [1950] 1 W.W.R. 894 (B.C. C.A.), where a prohibition application was rejected when sought on the ground that an appeal notice had not been served on the Crown, but merely on the private prosecutor. It was significant here that the court found that the Crown, through its actions, had shown that it did not consider itself to be a “party” to the proceedings.

29. That is, in the absence of intervention by the Attorney General or his agent. See: *R. v. Stoopnikoff* (1966), 47 C.R. 341 (B.C. C.A.); *R. v. Dzurich*, [1966] 2 C.C.C. 196 (Sask. C.A.); *R. v. Devereaux* (1966), 48 C.R. 194 (Ont. C.A.); *MacIsaac v. Motor Coach Industries Ltd.* (1982), 70 C.C.C. (2d) 226 (Man. C.A.). Berner, *supra*, note 3, p. 13, points out that there is some authority to indicate that an informant has no status to proceed beyond laying an information. But in the light of the authorities just referred to, as well as the unambiguous wording of *Code* section 737, this view can no longer be sustained.

Whether or not the prosecution can be carried out in the name of the private prosecutor is a vexed question. It has been shown that the information may be laid in the name of the private prosecutor. By contrast, the summons or warrant (which signals the authority of the state) issues in the name of the Crown. But what of the prosecution itself? There is authority to suggest that in Québec, at least, proceedings for summary conviction offences may be conducted in the name of the private prosecutor.<sup>30</sup> There is conflicting authority in other jurisdictions.<sup>31</sup>

In one case, *R. v. Devereaux*,<sup>32</sup> the Ontario Court of Appeal took the following view:

The distinction between the information and the summons is an essential one and one which should be readily apparent. The information is the subject's remedy to bring to the attention of the Sovereign the alleged offence against the Sovereign. The summons is the Sovereign's act in calling the accused before her "justice". The "*prosecution*" commences when the "*justice*" issues the summons addressed to the accused. Viewed from this angle it is clear that the laying of an information does not entail any act on the part of the Sovereign and therefore it is not required to be laid in the name of the Sovereign; it is equally clear that by the summons issued under the *Criminal Code* or *The Summary Convictions Act* ... the Sovereign intervenes, and the proceedings are carried on in the name of the Sovereign."<sup>33</sup> [Emphasis added]

If this view of the commencement of the prosecution were to govern, then the question of setting forth the names of the parties in the style of cause is meaningless since, as a practical matter, all criminal and quasi-criminal actions eventually involve documents such as the summons or warrant which indicate the Crown's interest in the proceedings.<sup>34</sup> By this view all proceedings are notionally carried on in the name of the Crown, even though the Crown may not regard itself as a party to the proceedings. The practice of styling documents in the name of the Crown or even in conjunction

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30. *Gagnon v. Morin* (1955), 116 C.C.C. 104 (Qué. S.C.).

31. *Beauvais v. The Queen*, [1956] S.C.R. 795. This case seems merely to be authority for the proposition that where a magistrate is exercising absolute jurisdiction, no formal indictment is necessary to proceed with an otherwise indictable offence. However, *Taschereau J.* does appear to have adopted the rule that criminal prosecutions must proceed in the name of the Crown. This would appear to mean that provincial offences do not need to be so designated. *Campbell v. Sumida* (1964), 45 C.R. 198 (Man. C.A.) appeared to take this view too, but the decision of the Manitoba Court of Appeal (*Usick v. Radford*, *supra*, note 18) decided that the *Campbell* case was no longer authoritative. In *Usick* an information sworn out by the private prosecutor in his own name was held to be valid. The justice before whom it was sworn issued a summons against the defendant "in Her Majesty's name." It is interesting to note that this case itself was an appeal by way of stated case to the Manitoba Court of Appeal and was brought in the names of the private prosecutor and the defendant without reference to the Crown.

32. *Devereaux*, *supra*, note 29.

33. *Id.*, p. 197, *per Kelly J.A.* See also *MacIsaac v. Motor Coach Industries Ltd.*, [1982] 4 W.W.R. 436 (Man. Co. Ct.); *aff'd supra*, note 29.

34. In theory, at least, it is possible for an accused to appear voluntarily to answer to an information with neither process being issued.

with the Crown would exist, on this reasoning, largely out of an abundance of caution.<sup>35</sup>

Under section 734 of the *Code*, where the prosecutor does not appear for the trial, the court has no jurisdiction to proceed in his absence. It must either dismiss the charge or adjourn to such other time and on such terms as it considers proper.

## B. Indictable Offences

It is in the area of indictable offence procedure that a strong argument can be made in support of the view that the common law has been “altered, varied, modified, or affected” so as to make inroads in, if not replace, the common law. The common law is relatively clear:

Under English law there is ... not the slightest doubt that a private prosecutor ... can at the present day in the absence of intervention by the Crown, carry through all its stages a prosecution for any offence.<sup>36</sup>

The provisions in the *Code* dealing with the disposition of indictable offences differ in many respects from those presently existing in England, some of them being apparently inconsistent with the theory that a private prosecutor may carry the matter forward. There are presently three alternative modes of trial of indictable offences: (1) trial before a judge and jury;<sup>37</sup> (2) “speedy trial” without a jury but before a judge as defined in Part XVI;<sup>38</sup> and (3) summary trial before a provincial court judge.<sup>39</sup>

If the trial is to be before a judge and jury or a speedy trial, a preliminary hearing is ordinarily convened.<sup>40</sup> Under sections 496 and 504 to 507 of the *Code*, as amended by 1985, c. 19, s. 111, proclaimed in force December 2, 1985 (hereinafter also referred to as the *Criminal Law Amendment Act, 1985*), the public prosecutor or Crown attorney may prefer an indictment against any person who elects to be tried before a judge and jury or who has been ordered to stand trial. Where a preliminary inquiry has not been held, or has been held but the accused has been discharged, an indictment shall not be preferred without the personal written consent of the Attorney General or

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35. Presumably, in the light of *McIlree*, *supra*, note 28, at least so far as provincial offences are concerned, the Crown can indicate that it does not regard itself as a “party” to the proceedings, even though the summons was in the name of the Crown on the information of the private prosecutor.

36. *Schwerdt*, *supra*, note 9, p. 38. This is subject to some exceptions: see Royal Commission on Criminal Procedure, *supra*, note 10, Appendix F.

37. *Criminal Code*, ss. 427, 484.

38. *Criminal Code*, ss. 484, 488, 489.

39. *Criminal Code*, ss. 483, 484, 487. The procedure adopted is that laid down under Part XVI.

40. Under Part XV of the *Code*. No preliminary hearing is necessary where an indictment has been preferred pursuant to sections 505 and 507 of the *Code*.



his deputy, or the written order of a judge of the court. A formal indictment is unnecessary if the accused is being tried summarily.<sup>41</sup>

Where the prosecutor is other than the Attorney General and the Attorney General has not intervened, the law now requires that the private prosecutor must obtain a written order of a judge of the court in any case before an indictment is preferred.

In *Schwerdt*,<sup>42</sup> perhaps the leading case on the status of the private prosecutor in Canada prior to the enactment of the *Criminal Law Amendment Act, 1985*, Wilson J. concluded that the rights of the private prosecutor *vis-à-vis* the different modes of trial of an indictable offence were:

(1) On summary trial before a magistrate, the private prosecutor is heard as of right.<sup>43</sup>

(2) A preliminary hearing may be conducted by a private prosecutor.<sup>44</sup> This conclusion may be drawn from the term "prosecutor" as used in Part XV of the *Code*, dealing with preliminary hearings. The meaning is that laid down in section 2 of the *Code* which, as was noted in the discussion on summary conviction offences, includes a private prosecutor.

(3) "On speedy trial before a judge he cannot be heard unless the Attorney-General or the clerk of the peace prefer a charge, or the Attorney-General allows him to prefer a charge."<sup>45</sup> This is because under section 496 of the *Code*, where the accused elects speedy trial "... an indictment ... *shall* be preferred by the Attorney General or his agent, or by any person who has the written consent of the Attorney General, and in the Province of British Columbia may be preferred by the clerk of the peace." The language is mandatory and only if the Attorney General so permits can the private prosecutor personally pursue the case. He can attempt to persuade the Attorney General or clerk of the peace to lay the indictment and then proceed with the case himself. If such an indictment is not laid, the matter rests there.<sup>46</sup> (This particular holding, while accurate until very recently, is no longer authoritative. Recent legislative amendments to sections 504 and 507 of the *Code* repose the power to consent to the preferment of an indictment in a judge of the court rather than in the Attorney General.)

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41. *Beauvais v. The Queen*, *supra*, note 31. If the accused is being tried under Part XVI of the *Code*, the private prosecutor is entitled to be present at all times during the trial, and even if the accused proposes to plead guilty, the justice cannot proceed in his absence. Such private prosecutor is entitled to call evidence in aggravation or mitigation: see *Re McMicken*, *supra*, note 26.

42. *Supra*, note 9, p. 46.

43. See *Re McMicken*, *supra*, note 26. We have already dealt with the provisions of Part XXIV of the *Code* that support this conclusion as regards summary conviction offences. Note that the judicial officer conducting summary trials is now a provincial court judge, not a magistrate.

44. Unless, of course, the Crown has intervened. *Schwerdt*, *supra*, note 9, p. 40.

45. *Id.*, p. 46.

46. *Berner*, *supra*, note 3, p. 13.

(4) On trial by judge and jury the private prosecutor may be heard by leave of the court or the Attorney General.<sup>47</sup> Wilson J. reached this conclusion in 1957 largely through the combined effect of the term “prosecutor” appearing in a number of sections of Part XVII of the *Code* (such term including “private prosecutor” under section 2 of the *Code*) and then subsection 507(2), whereby “[a]n indictment under subsection (1) may be preferred by the Attorney General or his agent, or by any person with the written consent of a judge of the court<sup>48</sup> or of the Attorney General or in any province to which this section applies, by order of the court.” Wilson J. held that this provision, together with the former section 558 of the 1955 *Code* which distinguished between “the Attorney General or Counsel acting on his behalf”<sup>49</sup> were conclusive in favour of the private prosecutor’s right to proceed in jury trials. The learned judge was of the view that we must start with “the premise that a private prosecution is lawful unless forbidden”<sup>50</sup> and that no clause in Part XVII forbids such a prosecution either expressly or by necessary implication.<sup>51</sup> (Here again the law has recently been altered by legislative amendment. The statute is now clear as to the private prosecutor’s right to prefer an indictment in cases involving trial by jury so long as the written order of the court has been obtained. The option of obtaining a consent from the Attorney General no longer exists.)

Wilson J. was also of the opinion that “if the Court can allow a citizen to prefer an indictment [pursuant to then subsection 507(2)] it must also allow him to prosecute on it, otherwise the provision has no practical usefulness.”<sup>52</sup> It should be noted that the indictments preferable under section 507 of the *Code* may be laid “even in cases where there was no preliminary inquiry or where the accused was liberated at the *enquête*.”<sup>53</sup> This situation remains unchanged under the current law.

*Schwerdt*<sup>54</sup> was concerned with a finite issue: Can a private prosecutor conduct a summary trial or preliminary inquiry relative to an indictable offence? In affirmatively answering these questions, Wilson J. in his judgment went beyond the strict confines of the issues raised and indulged in extensive *obiter dicta* (indeed he specifically acknowledged this),<sup>55</sup> but his is the only judicial attempt based on a complete analysis

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47. *Schwerdt, supra*, note 9, p. 46.

48. A court should only grant consent to a private prosecutor to prefer an indictment: (a) if a preliminary hearing has been held, only when it is needed to prevent a miscarriage of justice, and (b) if there has been no preliminary hearing, only if there are urgent and other persuasive reasons: *Re Johnson and Inglis* (1980), 52 C.C.C. (2d) 385 (Ont. H.C.).

49. This 1955 section has been replaced by section 578 of the *Code*, where only the term “prosecutor” is used. The change does not reduce the force of Wilson J.’s argument.

50. *Schwerdt, supra*, note 9, p. 41.

51. There are provisions dealing with defamatory libel that specifically acknowledge the role of the private prosecutor: sections 566 and 656 of the *Code*.

52. *Schwerdt, supra*, note 9, p. 41.

53. Kaufman, *supra*, note 1, pp. 106-7. See *R. v. Beaudry*, [1967] 1 C.C.C. 272 (B.C. C.A.) for a full, though somewhat dated, discussion of this matter.

54. *Supra*, note 9.

55. *Id.*, p. 42.

of the *Code* provisions to rationalize the private prosecutor's role under the *Code*. It must also be borne in mind that his fourth conclusion concerning the right of the private prosecutor to proceed with jury trials is based only on the *Code* provisions peculiar to the provinces that have abolished the grand jury (although there is little real difference in this regard between the two systems).<sup>56</sup>

Section 504 now grants a prosecutor the power to prefer a bill of indictment against an accused regarding any charge founded on facts disclosed at the preliminary hearing, in addition to or in substitution for any charge on which that person was ordered to stand trial.

The *Schwerdt*<sup>57</sup> case has not been free of criticism.<sup>58</sup> Indeed, the conclusions drawn by Wilson J. appear arbitrary in relation to each other. Why should a private prosecutor's ability to conduct his case turn on the *mode* of trial since this is a matter which may be determined by the accused himself? Yet, as one author has pointed out, "[i]t is difficult to find fault with [the learned judge's] reasoning."<sup>59</sup> As noted, the ambiguities of the law in this regard have in large measure been rectified and clarified by the enactment of the *Criminal Law Amendment Act, 1985*.

#### IV. Appeals

In our examination of trial procedure, an attempt has been made to ascertain whether or not the common law rights of the private prosecutor had been altered by the *Code*. The conclusion reached, based largely on the reasoning in *Schwerdt*, was that the common law had been altered so far as indictable proceedings were concerned. However, in the area of appeals the emphasis changes: "It is a well-established principle that there is no inherent right to appeal from the decision of any court and that such right exists only when it is expressly given by statute."<sup>60</sup>

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56. The only difference seems to that before a bill of indictment can be preferred where a preliminary hearing has not been held or has been held and the accused discharged, the consent of a judge or the Attorney General must be obtained (*Criminal Code*, s. 505(4)). The only grand jury jurisdiction now remaining in Canada is in Nova Scotia (*Criminal Code*, s. 507(1)).

57. *Supra*, note 9. This, after all, is only a decision of court of first instance.

58. Kaufman, *supra*, note 1, p. 113.

59. Berner, *supra*, note 3, p. 13.

60. L.J. Ryan, ed., *Tremeeear's Annotated Criminal Code*, 6th ed. (Toronto: Carswell, 1964), p. 1547, citing a dictum by Hall J. in *R. v. Joseph* (1900), 11 Que. K.B. 211: "An appeal is not a general or common law right. It is an exceptional provision enacted by statute, and, to be availed of, the conditions imposed by the statute must be strictly complied with." This has a practical effect, as Berner, *supra*, note 3, p. 18, has concluded:

[W]here it is necessary to draw inferences from the legislation, one must start in the one case [trial proceedings] with a kind of presumption that private prosecution is permissible *unless excluded*; but in considering the rights of appeal, the presumption is reversed, and it must be assumed that no such right exists unless it is *expressly conferred*.

What then have been the statutory rights of appeal under the *Code* and do they confer “standing” on a private prosecutor?

Summary conviction appeals are dealt with under the provisions of section 748 of the *Code*. Under paragraph (b), “the informant, the Attorney General or his agent ...” may appeal from an order dismissing an information or against sentence.<sup>61</sup> Therefore, this provision does confer on a private prosecutor the right to appeal against dismissal of the action or the sentence imposed.<sup>62</sup> As a matter of procedure, no reference to the sovereign needs to be made where an informant is appealing.<sup>63</sup>

The situation is quite different, however, when one is dealing with indictable offences. Statutory provisions stipulate that only the person convicted<sup>64</sup> or the Attorney General or counsel instructed by him<sup>65</sup> has standing in appeals to the court of appeal or the Supreme Court of Canada.<sup>66</sup> These provisions, by their terms, do not grant a private prosecutor the power to pursue an appeal. How can this apparent anomaly be explained? Perhaps by viewing this state of affairs as a compromise:

[I]t may be considered a reasonable compromise between the interest of the private prosecutor in pursuing an accused, the interest of an accused in being free from unwarranted harassment, and the interest of the state — as represented by the Attorney-General — in seeing that justice is done. The claim of the private prosecutor is satisfied by allowing him to ensure that the accused is put on trial. The accused is protected by being allowed to appeal in any event, where he is convicted; and, where he is acquitted, by being freed from the prospect of an appeal by the prosecutor personally. And the interest of the state is protected by allowing the Attorney-General his right of appeal in any case, whether a private prosecution or not.<sup>67</sup>

This rationalization in our view is likely to be small comfort to the unsuccessful prosecutor in proceedings on indictment, who, having a legitimate ground of appeal, learns that his interest ceases with the trial of the accused<sup>68</sup> and that the doors to the

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61. See Ryan, *id.*, p. 1550, and L.J. Ryan, ed., *Tremear's 1971-1984 Criminal Annotations* (Toronto: Carswell, 1984), pp. 866-8. The same right is conferred on a private prosecutor in relation to appeals by way of stated case under section 762 of the *Code*.

62. Berner, *supra*, note 3, p. 17, considers the private prosecutor to have the right also to appeal against conviction. But this power is confined to the defendant under paragraph 748(a) of the *Code*. A private prosecutor (informant) may, under paragraph 748(b), appeal from an order dismissing an information or against the sentence passed upon the defendant.

63. *R. v. Allchin* (1971), 6 C.C.C. (2d) 332, [1972] 2 O.R. 580 (C.A.). This case concerned dismissal of an information.

64. *Criminal Code*, s. 603.

65. *Criminal Code*, s. 605.

66. *Criminal Code*, ss. 618-621.

67. Berner, *supra*, note 3, p. 18.

68. The protection of the accused is extended in any event by section 612 of the *Code*, granting an appeal court the summary power to terminate frivolous or vexatious appeals. This is largely nullified by subsection 610(3), whereby the appeal court has no power to award costs. Such costs are now regarded as available in summary conviction appeals: *R. v. Ouellette*, [1980] 1 S.C.R. 568; *R. v. Crosthwait*, [1980] 1 S.C.R. 1089.

appeal courts are closed to him. However, the law on this is clear: a private prosecutor has no standing in indictable appeals even though he possesses the ability to pursue an appeal from summary conviction proceedings.

It would also seem that so long as the Crown has not intervened, the private prosecutor as a litigant can seek judicial review or extraordinary remedies in summary conviction matters but has no such ability in relation to those indictable offences which he may not pursue.<sup>69</sup>

## V. Miscellaneous Interventions by the Crown

As has been earlier indicated, the power of a private prosecutor to pursue a prosecution is subject to the Crown's decision to "intervene." Intervention can be of two kinds.

The first is *intervention for the purpose of exercising control over the course of the prosecution at a public level*. In *R. v. Leonard*,<sup>70</sup> Kirby J. took the view that the provincial Attorney General had an inherent power to intervene and withdraw an information alleging theft laid by a private prosecutor. This discretion to *withdraw* is described as being "judicial" in nature, which normally means that judicial review of the activity is possible. However, the courts are most reluctant to interfere with an Attorney General's exercise of this discretion.<sup>71</sup> Such a withdrawal by an Attorney General has been found not to conflict with the provisions of the *Canadian Bill of Rights*.<sup>72</sup> The Crown can also intervene to *pursue* the prosecution since the rationale for all such intervention at common law is "to prevent a private prosecutor, in case of abuse or unjustified proceedings against any of [the Crown's] subjects, from perpetrating an injustice."<sup>73</sup> This occurred in *Re Bradley and The Queen*,<sup>74</sup> a private prosecution arising out of a labour dispute where the charge was the summary conviction offence of intimidation under paragraph 381(1)(a) of the *Code*. The Ontario Court of Appeal upheld the provincial Attorney General's power (through his agent) to intervene and

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69. In those indictable offences which the private prosecutor can pursue, the Crown is rendered a party for this purpose.

70. (1962), 37 C.R. 374 (Alta. S.C.). See also *Re Dick*, [1968] 4 C.R.N.S. 102 (Ont. S.C.).

71. *R. v. Weiss* (1915), 23 C.C.C. 460, 7 W.W.R. 1160 (Sask. S.C.).

72. S.C. 1960, c. 44; *R. v. Leonard*, *supra*, note 70, pp. 381-2. It is probably also consistent with the provisions of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, c. 11 (U.K.).

73. *Campbell v. Sumida*, *supra*, note 31, p. 207, *per* Miller C.J.M. This is without real significance since the Attorney General could enter a stay of proceedings and reinstitute proceedings if he formed the opinion that although the private prosecution was abusive the proceedings nevertheless *should* be taken against the accused. It should be noted that *Campbell's* case is no longer authoritative insofar as style of action is concerned: *Usick v. Radford*, *supra*, note 18, p. 192.

74. (1975), 9 O.R. (2d) 161 (C.A.).



proceed with the case even though the private prosecutor had advised the remand court that he wished to withdraw the charge. Arnup J.A. speaking for a unanimous court stated:

The Attorney-General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statute in this country, is parallel to but not in substitution for the role of the Attorney-General, and where the two roles come into conflict, the role of the Crown's prosecutor is paramount, where in his opinion the interests of justice require that he intervene and take over the private prosecution.<sup>75</sup>

However, does the power in the Attorney General to intervene and withdraw an information apply to both summary conviction and indictable offences? *Leonard* was concerned with an indictable offence. This class of criminal offence is clearly susceptible to such intervention as a result of the meaning of the term "prosecutor" in section 2 of the *Code*<sup>76</sup> which applies to Parts XV and XVI of the *Code* governing the preliminary inquiry and trial procedure of indictable offences. Where the Attorney General does intervene, he, or his agent, becomes the prosecutor and the private prosecutor has no standing.

Part XXIV of the *Criminal Code*, dealing with summary conviction offences, previously had its own definition of "prosecutor" in subsection 720(1)<sup>77</sup> which made no specific mention of the power of intervention by the Attorney General. However, the definition of "prosecutor" was amended in 1985.<sup>78</sup> The amended text now provides that the term "prosecutor," for the purpose of summary conviction offences, includes the Attorney General or, where the Attorney General does not intervene, the informant, or counsel or an agent on behalf of either of them.<sup>79</sup> The amendments to the *Criminal Code* are a clear indication that Parliament did not intend, in minor cases, to strip the Attorney General of the capacity to control abusive prosecutorial practices — especially when he has a formal obligation otherwise to assure himself of the integrity of all prosecutions.

The second kind of intervention is *intervention in order to stay proceedings*. The power to enter a stay of proceedings,<sup>80</sup> which is vested in the Attorney General or

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75. *Id.*, p. 169.

76. Section 2 of the *Code* states: "'prosecutor' means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings ..."

77. Subsection 720(1) of the *Code* prior to the proclamation of the *Criminal Law Amendment Act, 1985* provided: "'prosecutor' means an informant or the Attorney General or their respective counsel or agents; ..." In the amended definition: "'prosecutor' means the Attorney General or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them; ..."

78. See the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 169(1).

79. Note also that summary conviction offences are subject to a stay of proceedings (*Criminal Code*, s. 731).

80. *Criminal Code*, ss. 508 (indictable offences) and 731 (summary conviction offences). This was known as *nolle prosequi* at common law. See *Beaudry, supra*, note 53. An Attorney General cannot intervene to stay proceedings by a private prosecutor commenced by preferring an indictment by consent of a judge: *Re Johnson and Inglis, supra*, note 48.

counsel instructed by him, is regarded as being of particular social value where abusive private prosecutions have been initiated.<sup>81</sup> Thus, where an Attorney General deems it advisable he may order a stay of proceedings to prevent the private prosecutor from pursuing his cause of action. Nevertheless, the courts have been at pains to insure that the Attorney General remains accountable to the legislature for his actions.

The recent case of *Dowson v. The Queen*<sup>82</sup> established that the Attorney General cannot stay proceedings on an information which is before a justice, until the justice has decided whether or not to issue process. Although the Supreme Court of Canada held that the Attorney General had the clear right to stay proceedings *after* process was issued, to allow it *before* this would disturb a citizen's right to have the justice hear and consider the allegation and determine whether or not to act on it. The court, by this ruling, was seeking to reinforce the Attorney General's accountability to the legislature<sup>83</sup> by ensuring that the decision to intervene was not only deliberate but also open.

An Attorney General's power to intervene has a complication that is introduced by reason of the constitutional division of powers in the Canadian federal state. The provincial Attorney General may only intervene in relation to those matters ordinarily prosecuted by provincial authorities, while the federal Attorney General is restricted to prosecutions validly falling within the federal domain. Accordingly, only in those circumstances where the Attorney General of Canada has the power to initiate and validly proceed against an accused under a federal statute is it possible<sup>84</sup> for him to intervene.<sup>85</sup>

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81. J.F. Archbold, *Criminal Pleading and Practice*, 30th ed., p. 111, cited in Ryan, *supra*, note 60, p. 843, contains the following observations:

The usual occasion of granting a *nolle prosequi* [or a stay of proceedings] is either where in cases of misdemeanor a civil action is depending for the same cause ... or where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence ... or if it is clear that an indictment is not sustainable against the defendant ....

82. [1983] 2 S.C.R. 144. See also *Buchbinder v. The Queen*, [1983] 2 S.C.R. 159.

83. *Dowson*, *id.*, p. 155.

84. Berner, *supra*, note 3, p. 28, raises doubts as to the constitutional validity of this outside the territories mentioned. But see *R. v. Guenot, Kocsis and Lukacs* (1979), 51 C.C.C. (2d) 315 (Ont. C.A.); *R. v. Parrot* (1979), 27 O.R. (2d) 333 (Ont. C.A.); and *The Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

85. Unless the matter takes place in the Northwest Territories or Yukon Territory. There is authority to the effect that a private prosecutor can revive a stayed prosecution on a different information: *R. ex rel. McNeil v. Sanucci*, [1975] 2 W.W.R. 203 (B.C. Prov. Ct.). But see *contra*, *R. v. McKay* (1979), 9 C.R. (3d) 378 (Sask. C.A.).





## CHAPTER THREE

### The Role of Private Prosecutions Today: The Policies at Stake

In Canada, the vast bulk of prosecutions<sup>86</sup> is initiated by the police and prosecuted by a public official, usually a Crown attorney.<sup>87</sup> Given this reality, it is valid to ask whether there is a role for the private prosecutor to play in the contemporary criminal justice system. In answering this question we find it necessary and important to observe, as did the Ouimet Committee which in 1969 reported on the state of corrections in Canada,<sup>88</sup> that an effective and fair criminal justice system requires the existence of discretion and should allow it at each stage of the criminal justice process:

To implement the Committee's proposition that the criminal law should be enforced with a minimum of harm to the offender, discretion should be exercised in cases involving individuals who are technically guilty of an offence but where no useful purpose would be served by the laying of a charge. Where a charge is laid, discretion should be exercised as to the manner in which the law is applied.

This means ... [t]he prosecution should have appropriate discretion to determine whether a charge is to be laid or proceeded with, and whether conviction on a lesser charge would satisfy the requirements of justice.<sup>89</sup>

Discretionary power of this nature is only relevant within the framework of a system of public prosecution.<sup>90</sup> Since public prosecutors do indeed possess many such discretionary powers, this fact, in a curious way, serves to strengthen the social justification for the retention or expansion of private prosecutions. For in a public prosecution system, it is only where a public prosecutor has failed to exercise his discretion to prosecute that a private prosecutor will feel the need to take action personally. If one accepts these postulates, can a case be made out for the removal of the power to prosecute privately?

Glanville Williams is of the view that "[t]he power of private prosecution is undoubtedly right and necessary in that it enables the citizen to bring even the police

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86. Whether the alleged offence is criminal or quasi-criminal, federal or provincial.

87. See B.A. Grosman, "The Role of the Prosecutor in Canada" (1970), 18 *Am. J. Comp. L.* 498. In some cases the prosecutor is a police officer or other enforcement official.

88. *Report of the Canadian Committee on Corrections*, Roger Ouimet, Chairman (Ottawa: Information Canada, 1969).

89. *Id.*, pp. 16-7.

90. See G. Williams, "Discretion in Prosecuting," [1956] *Crim. L.R.* 222, on this subject generally.

or government officials before the criminal courts, where the government itself is unwilling to make the first move.”<sup>91</sup> But there is a more basic argument in favour of retaining the power of private prosecutions:

[A] private person will normally prosecute only where his interest is deeply affected or his emotions strongly aroused, and not always even then. Even in early times, when passions were stronger than they are now and the desire to retaliate was not looked upon as uncivilised, it was thought necessary to supplement the thirst for vengeance by a regular system of presentment of crime by the tithing and grand jury.<sup>92</sup>

One American commentator, convinced that a system of private prosecutions is a necessary adjunct to a public prosecutions system, contends:

A system of private prosecution can be justified in terms of both society’s interest in increased law enforcement and the individual’s interest in vindication of personal grievances. Full participation by the citizen as a private prosecutor is needed to cope with the serious threat to society posed by the [public prosecutor’s] improper action and inaction.<sup>93</sup>

Although the Ouimet Report deliberately minimizes the individual’s interest in vindication of personal grievances as an element of punishment,<sup>94</sup> this interest nonetheless has a place in our criminal justice system.<sup>95</sup> It may be unwise for society to ignore this elemental facet of human personality, since individuals, frustrated by the law, may seek to accommodate themselves by unlawful means.<sup>96</sup> Clearly the harmed party has a strong and valid interest in the exacting of justice.<sup>97</sup> It is no answer to respond to this contention by saying that the victim has a remedy in the civil courts, because his or her personal injuries are not really measurable in monetary damages. Also, the accused will almost invariably be judgment-proof.<sup>98</sup>

The retributive justification for the retention of a system of private prosecutions is clearly open to a basic moral objection, one with which we fully agree: vengeance is not a *proper* goal for either individuals or the state. Indeed this was the very impetus

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91. G. Williams, “The Power to Prosecute,” [1955] *Crim. L.R.* 596, p. 599. This quotation summarizes D. Hay’s argument in “Controlling the English Prosecutor” (1983), 21 *Osgoode Hall L.J.* 165, p. 179.

92. Williams, *id.*, p. 675.

93. Comment, “Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction” (1955), 65 *Yale L.J.* 209, p. 227.

94. *Supra*, note 88, p. 15. It recognizes deterrence, rehabilitation and control as the only elements of punishment properly operating to protect society.

95. O.W. Holmes, *The Common Law* (1881, reprinted Boston: Little, Brown, 1963), pp. 39-42, considered vengeance (retribution) a proper objective of the criminal law, referring to Stephen for support.

96. M.R. Cohen, “Moral Aspects of the Criminal Law” (1940), 49 *Yale L.J.* 987, p. 1010.

97. *Supra*, note 93, p. 228.

98. In the same way the provision of crime-victim indemnification schemes cannot other than imperfectly compensate the victim for his injuries.

behind an abortive 1854 Bill in the English House of Commons which was designed to abolish private prosecutions:

The object of the present Bill is to withdraw from a sphere of private animosity, compromise, and revenge, that which ought never to be left to such chances and to see that justice is properly administered.<sup>99</sup>

Given the nature of man and his urge to retaliate when victimized, it may be argued that it is better for the legal system to channel and ritualize such conduct rather than force him to respond at a primordial and socially destructive level.<sup>100</sup>

Arguments in support of a system which allows private prosecutions are reinforced when viewed in the Canadian context, from a perspective outside the *Criminal Code*. In the *Criminal Code*, the only offence that is recognized as being of an inherently private nature and hence susceptible to a private prosecution is that of defamatory libel.<sup>101</sup> That offence is concerned with protection of an interest in reputation, and thus is of a personal rather than public nature. However, over the past two decades, legislation has been enacted by both the federal and provincial authorities that are concerned to protect public interests, for example, in consumer protection and environmental quality.<sup>102</sup>

This legislation usually imposes duties the breach of which involves significant sanctions. Very often the "victim" is unaware that he has been victimized. In any event, offences under this kind of legislation are generally regarded as less significant by busy prosecutors who have a full calendar of "standard crimes" to cope with. As a result, public interest groups throughout Canada have altered their customary roles and now often act as informal watch-dogs in the regulated field. They or their members have been involved in private prosecutions under the legislation concerned. These individuals are not "victims" in the classic sense.<sup>103</sup> Rather than seeking vengeance or

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99. J.G. Phillimore, M.P. (1854), 130 Parl. Deb., 3rd Series 666.

100. S. Jacoby, in *Wild Justice: The Evolution of Revenge* (New York: Harper & Row, 1983), argues (on pp. 9-10) for the victim to be part of the social system of justice. Failure to meet this need may give rise to vigilantism:

A victim wants to see an assailant punished not only for reasons of pragmatic deterrence but also as a means of repairing a damaged sense of civil order and personal identity ... a society that is unable to convince individuals of its ability to exact atonement for injury is a society that runs a constant risk of having its members revert to the wilder forms of justice.

101. *Criminal Code*, s. 265. The Commission has advocated the repeal of this section of the *Criminal Code* in *Defamatory Libel* [Working Paper 35] (Ottawa: Supply and Services, 1984).

102. The Commission has recently advocated further initiatives in this area: see *Crimes against the Environment* [Working Paper 44] (Ottawa: LRCC, 1985).

103. Any person may initiate a prosecution, not merely the victim: *Duchesne v. Finch* (1912), 23 Cox C.C. 170; *Young v. Peck* (1913), 77 J.P. 49. It makes no difference if the offender has compensated the victim: *Smith v. Dear* (1903), 20 Cox C.C. 458.

retribution, they are acting in the public interest as they see it.<sup>104</sup> This type of citizen action reinforces democratic values and public perceptions of justice, yet does so within a system that has public prosecutors as the linchpin of the prosecution process.<sup>105</sup>

Whatever may be the theoretical nature of prosecutions in Canada, we clearly *do* have a formal system of public prosecutors<sup>106</sup> many of whom are career appointees. In Canada, public prosecutors are appointed rather than elected officials as they are in the United States.

Systems based upon public prosecution, whether with elected or appointed prosecutors, are not without their critics. England, which has no shortage of such critics, has wrestled with the question of how best to structure its prosecution process. The Justice Report<sup>107</sup> of 1970 recommended the establishment of a centralized Department of Public Prosecutions and the retention of the power of the private citizen to initiate and proceed in the criminal process subject to the power of the Department of Public Prosecutions to take over the prosecution as it sees fit and this was adopted by legislation in 1979.<sup>108</sup> English objections to a centralized system of public prosecutions have been summarized as follows:

Those opposed to the threatened innovation [public prosecution] pointed to the experience of other countries where, they charged, the control of the machinery for administering criminal justice had fallen necessarily into the hands of political parties and was being used by hordes of unscrupulous politicians to promote private or political ends. Private prosecutions ... were infinitely preferable ... to an enforcement of the criminal law which made the liberty of citizens dependent on the caprice or venom of party managers ....<sup>109</sup>

The same general view has been expressed by a former Director of Public Prosecutions himself who favoured the retention of the private prosecutor:

Suggestions are made from time to time that the scope of [his] Department might with advantage be extended, and the tendency in recent years has been to add to the responsibilities of the Director, both in practice and by statute .... [I]n dealing with the administration of the criminal law, proposals that tend in any degree to lessen the sense of the responsibility of the individual citizen actively to assist in the day-to-day enforcement of the law should be critically examined before they are accepted. Economy and even efficiency

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104. We do not propose to demonstrate, beyond the modest recommendations which we put forward in this document, how private prosecutions could be implemented more extensively, even within the present system. That is a topic which, if pursued, requires greater study. However, it is clear that financial factors would play a large part in such an extension, particularly where quasi-criminal offences are concerned. On this topic generally, see L.B. Hughes, *Private Enforcement of Federal Environmental Legislation* (1982), p. 42.

105. *Supra*, note 93, pp. 225-9.

106. Grosman, *supra*, note 87.

107. "The Prosecution Process in England and Wales," a Report by Justice: Criminal Justice Committee, [1970] *Crim. L.R.* 668, p. 681 (hereinafter referred to as the Justice Report).

108. *Prosecution of Offences Act 1979*, c. 31, s. 4 (U.K.).

109. Comment, *supra*, note 93, p. 234, note 130, quoting P. Howard, *The Conduct of Criminal Prosecutions in England* (unpublished paper) cited in R. Moley, *Politics and Criminal Prosecution* (1929), p. 201.

are not necessarily adequate reasons for making changes that may disturb the foundations upon which our system of criminal justice has been built .... The lesson to be learned from a study of the history of the criminal law is that we have secured and preserved our individual liberty and security by evolving a system under which these still depend ultimately not upon an executive, however benevolent, nor upon a judiciary, however wise, but upon the active support and the final judgment of our fellow citizens.<sup>110</sup>

Essentially, proponents contend that private prosecutions are valuable to the general enforcement effort. They operate as an informal review of discretionary powers. By contrast, opponents of private prosecutions are concerned that they may lead to prosecutions for personal gratification, private gain or malice. Also, the power to prosecute privately may conceivably give rise to blackmail situations, with the potential prosecutor demanding some advantage from the potential accused not to prosecute his case. In truth this latter objection is groundless since most jurisdictions, Canada among them, have criminal sanctions against such demands.<sup>111</sup>

From an administrative perspective, it is probably true to say that maximized economy and efficiency will result if prosecutions are left solely to public prosecutors, particularly if the administrative machinery is centralized.<sup>112</sup> However, it is to be doubted whether complete uniformity and centralized control is either possible or desirable within the Canadian context.

Our system of public prosecution attempts to separate, as nearly as possible, the police from the prosecution function. The arguments in favour of such separation of function are strong. However the benefits which this segregated system provides can be secured without removing from all persons *other than the public officials* rights to prosecute. A scheme could be structured so that the right to prosecute privately is retained without affecting those rights that are formally vested in investigators acting in a *public capacity*, whether it is as police officers or customs officials and so forth.<sup>113</sup>

Another argument in favour of the professional public prosecutor is that, having an independent public status and being a professional man, he is able to bring an objectivity to bear on the matter at hand as well as an expertise necessary in the understanding of the complexity of modern society and contemporary laws.<sup>114</sup> This is a

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110. Sir Theobald Mathew, *The Office and Duties of the Director of Public Prosecutions* (London: The Athlone Press, 1950), p. 16.

111. See *Criminal Code*, s. 305, dealing with extortion.

112. This view was expressed by Lord Cameron, in defence of the Scottish practice, who saw three desirable results of a centralized system of public prosecutions: (1) the almost complete dissociation of the police from a decision to prosecute; (2) a measure of uniformity of practice within the jurisdiction; and (3) a central control of decision as to the court in which prosecution is to proceed. In this regard see Lord Cameron, "Some Aspects of Scots Criminal Practice and Procedure," a presidential address to the Holdsworth Club, Faculty of Law, University of Birmingham (1971), p. 4. Bear in mind, though, that Scotland has since recognized the power to prosecute privately (see *infra*, note 218).

113. England is presently considering the implementation of just such a system: see the White Paper entitled *An Independent Prosecution Service for England and Wales*, Cmnd. 9074 (London: HMSO, 1983).

114. Justice Report, *supra*, note 107, p. 679.



very strong argument insofar as it bears on the removal of the investigating officer from the decision to prosecute. But does it have the same force in relation to intervention in the decision of the private prosecutor to prosecute? Some would argue that it does not, particularly where the decision of the prosecutor is *not* to proceed with the charge. Here we are necessarily also concerned with the wider role of the citizen in the criminal justice system and the need to satisfy him that his injury can be properly accommodated by it.<sup>115</sup>

The problem of abusive private prosecutions, particularly the malicious private prosecution adverted to previously, also requires consideration.<sup>116</sup> At the present time we cannot confidently state that potential accused persons possess the necessary protection against such abuse.<sup>117</sup> Possibly with the inclusion of an adequate set of costs provisions in the *Criminal Code* and appropriate provincial legislation, such residual objections as exist to the retention of private prosecutions would evaporate.<sup>118</sup>

Private prosecutions potentially can also be abused where there is public discussion or controversy concerning a matter and one of the persons involved proceeds to lay a criminal charge concerning it. This could, owing to the dampening effect of the *sub judice* rule which restrains public discussion of matters before the courts, stifle public debate at the most important moment and matters may be compounded by the fact that the charge may later be withdrawn by the prosecutor at the hearing. However, this potential abuse seems more theoretical than real and is rarely known to occur in practice. Here again, it is possible that with the introduction of an effective costs system, the abuse could readily be responded to by the courts.

If it were to become a reality, the expansion of the right to prosecute privately in Canada could only be accomplished at some expense, albeit small, of the rather vast discretionary power of the public prosecutor. Commentators such as Gittler<sup>119</sup> maintain that it would be a welcome check to prevent possible public prosecutorial charging bias against certain classes of victims.<sup>120</sup>

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115. An interesting case is *R. v. Metropolitan Police Commissioner, ex p. Blackburn*, [1973] Crim. L.R. 185 (C.A.) where the appellant unsuccessfully attempted to have mandamus issued against the respondent police commissioner to enforce the English pornography laws. The court of appeal held that the police had a discretion in carrying out their duty with which the courts will not interfere. The courts will intervene only where it can be established the police are *not* carrying out their duty: *R. v. Metropolitan Police Commissioner, ex p. Blackburn*, [1968] 2 Q.B. 118, pp. 136, 139. This was the same Mr. Blackburn who was then attempting to mandamus the commissioner to enforce the law against gaming houses.

116. See Williams, *supra*, note 91, p. 678. Note that the tort remedy of malicious prosecution should not be regarded as a complete protection since it is very difficult to succeed in such cases.

117. Present *Code* cost tariffs are inadequate and rarely resorted to.

118. Note that the Commission is presently engaged in a joint study with the Saskatchewan Law Reform Commission on the general subject of awarding costs in criminal cases. The particular topic of costs awards in private prosecutions will be one component of that study.

119. J. Gittler, "Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems" (1984), 11 *Perspective L.Rev.* 117-82.

120. See D.A. Schmeiser's Study Paper prepared for the Commission on *The Native Offender and the Law* (Ottawa: Information Canada, 1974).

It has been argued that where the victim seeks to initiate the process and carry the prosecution forward, allowing the overriding of negative prosecutorial charging decisions by permitting private citizens to have direct access to the courts would have a salutary effect on the victim's restitutive and retributive interests, or at least on his or her perceptions of those interests.

As noted, it has been contended that the widespread revival or expansion of private prosecutions would be neither practical nor socially desirable. According to this argument, the frequency of such cases would inevitably increase and the already overburdened criminal courts would be hard put to cope with this new influx.<sup>121</sup>

Finally, there remains the troublesome question. Whose interest should prevail, the citizen's or the state's, in the event of a conflict where the victim wishes to prosecute (or is prepared to have some individual other than the state prosecutor champion his cause)?

There are at least six possible models for restraining but allowing the private prosecution within a public prosecution system such as our own:<sup>122</sup>

(1) confine private prosecutions to those offences which interested parties are likely to want prosecuted but which public prosecutors are likely to be reluctant to prosecute;<sup>123</sup>

(2) combine private prosecution with some degree of public control by making notification or approval by the public prosecutor or the Attorney General a prerequisite;<sup>124</sup>

(3) make negative prosecutorial charging decisions subject to judicial review;<sup>125</sup>

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121. It is interesting that the Canadian experience does not seem to bear out this postulate. It should be remembered that in Canada few barriers exist to the actual *initiation* of a prosecution (that is, the laying of an information) regardless of whether the case is triable by summary conviction procedure or on indictment. The Attorney General's power of intervention and the inherent jurisdiction of the courts to control abuses of process serve to inhibit any tendency to drift toward proliferation of the private prosecution.

122. The first four of these models are described and discussed in Gittler, *supra*, note 119.

123. These include crimes among friends and neighbours, commercial frauds perpetrated on customers and clients, crimes of strict liability involving health and safety, and public torts. See A.S. Goldstein, "Defining the Role of the Victim in Criminal Prosecution" (1982), 52 *Miss. L.J.* 515, p. 559.

124. *Id.*, p. 560.

125. See: D.G. Gifford, "Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal" (1981), 49 *Geo. Wash. L.Rev.* 659, pp. 716-7; J. Vorenberg, "Decent Restraint of Prosecutorial Power" (1981), 94 *Harvard L.Rev.* 1521, p. 1568. Subsection 15(1) of the *Canadian Charter of Rights and Freedoms* may also give rise to such issues although it is arguable that the proper exercise of charging discretion is outside the scope of subsection 15(1) or is protected by section 1.

- (4) establish a mechanism whereby an interested party could challenge a negative prosecutorial charging decision by directly petitioning a grand jury or the court to initiate a prosecution;<sup>126</sup>
- (5) give the public prosecutor the power to intervene in proceedings once they have been commenced in order either to conduct the prosecution in the name of the state or to stay unmeritorious proceeding; and
- (6) require the private prosecutor to obtain the consent of the court before allowing an indictment to be preferred.

Alternative (1) serves no practical purpose since the present system arrives, in practice, at very much the same conclusion. Alternative (2) leaves unresolved the genuine conflicts between victim and prosecutor as to whether a prosecution should be undertaken. Alternative (3) has a disadvantage in that the judiciary has been traditionally reluctant to review prosecutorial charging decisions. Alternative (4) has the advantage of bringing justly accused persons to trial but it allows for a form of second-guessing of prosecutorial decisions which is foreign to Canadian legal traditions. While these four reform options provide general guidance, considerable fine tuning would be necessary before a distinctive contribution to Canadian law could be made. Alternatives (5) and (6) are attributes of our system as presently constituted.

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126. The grand jury is presently retained in Canada only by the province of Nova Scotia.



## CHAPTER FOUR

### Conclusions and Recommendations

While under Canadian law the private prosecutor is granted considerable power to pursue his case,<sup>127</sup> in practice it is a power that is very rarely exercised.<sup>128</sup> The frequency of the use of the power is not in our view an accurate measure of its value, which for reasons detailed previously we believe to be considerable. In summary conviction matters our law places few, if any, restrictions on the private prosecutor. However, our survey of the law, even as amended by the *Criminal Law Amendment Act, 1985*, reveals that insofar as indictable offences are concerned a few not inconsiderable anomalies still remain. Operationally these arise as a result of the mode of trial selected by the accused. Believing, as we do, that it is desirable to retain private prosecutions as a feature of our prosecution system, our burden then becomes one of devising appropriate means for ridding the system of these anomalies. At the same time we believe it important to make one perhaps implicit point abundantly clear: in making these proposals we are not in any significant way seeking to undermine the general supervisory role of the Attorney General in regard to criminal prosecutions. We say this having regard especially to the Attorney General's statutory duty to supervise all prosecutions and to intervene as necessary in order to conduct the prosecution or stay proceedings.

In our Working Paper 15, *Criminal Procedure: Control of the Process*, we recognized the importance of retaining private prosecutions, but in that Paper we tentatively recommended a restricted system that would have permitted unencumbered prosecutorial rights up to the charging process but not beyond.<sup>129</sup> This recommendation was premised on the public prosecutor having the final discretion in this regard, subject to judicial review.<sup>130</sup> Our thinking on this subject has evolved, having benefitted from further study, consultation and analysis. We are now of the view that more expanded rights should be conferred on private prosecutors.

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127. His powers are greater in summary conviction offences than in indictable offences: *Schwerdt, supra*, note 9.

128. For example, in British Columbia our consultant was advised informally by spokesmen for the Department of the Attorney General that, although no statistics are kept on the matter, there would be no more than ten such cases a year in the province that were permitted to proceed to trial. It is the policy in that province for the Attorney General to intervene and enter a stay of proceedings unless the case is one that the Department would have prosecuted on the facts.

129. LRCC, *supra*, note 3, pp. 49-50.

130. *Id.*, p. 50.

For the reasons given in Chapter Three, we believe that private prosecutions are not only desirable but also necessary for the proper functioning of the Canadian prosecution process. Our weighing of costs and benefits leads us to conclude that there are measurable gains not only to the citizen but also to the system of state prosecution in providing for private prosecutions as an adjunct to a public prosecution system.

Society as a whole is the beneficiary where formal, positive citizen interaction with the justice system results in some additional control over official discretion.<sup>131</sup> Also, the form of retribution which is exacted by the citizen's resort to legal processes is clearly preferable to other unregulated forms of citizen self-help. Further, the burgeoning case-loads which our public prosecutors routinely shoulder are, in some small measure at least, assisted by a system which provides an alternative avenue of redress for those individuals who feel that their cases are not being properly attended to within the public prosecution system. Finally, it is our belief that this form of citizen/victim participation enhances basic democratic values while at the same time it promotes the general image of an effective system of administering justice within the Canadian state.

For these significant reasons we believe that the right to prosecute privately ought not only to be retained but also extended to those elements of the trial and appeal process where they are presently proscribed or restricted. This means at the initiatory stages of the process that the right to lay an information and to issue process in relation thereto ought to remain as it is, unexceptional and subject to the ordinary law. The anomalies and restrictions which exist in relation to the right to carry a charge forward to trial where the offence is an indictable one ought to be removed. We see no reason for differing procedures which depend upon the nature of the charge and upon whether or not the prosecutor enjoys a public or a private status. It is difficult to accept as necessary the *prior* consent of the Attorney General to the initiation of a prosecution, given that he has the power in all cases to intervene *after* charges have been laid in order to direct a stay of proceedings and that this power is exerciseable regardless of whether the proceedings are triable by summary conviction procedure or on indictment. Therefore, we believe that the requirement which, prior to the passage of the *Criminal Law Amendment Act, 1985*, obliged a private prosecutor to obtain the consent of the Attorney General before being able to carry his prosecution forward (where the offence is indictable) is undesirable and ought not to be revived. We take this position subject to one caveat concerning the general question of criminal prosecutions requiring the prior consent of the Attorney General. This is presently under study as one component of our work on the Powers of the Attorney General. We do not at this time wish to be seen as ruling out or precluding the possibility of empowering the Attorney General to screen charges by means of the device of consent in relation to certain *specific* substantive offences (such as advocating genocide). Our position on this general issue will be clarified in the forthcoming Working Paper.

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131. See generally, Hay, *supra*, note 91, p. 186.

In a similar vein, we see no compelling justification for requiring, as we presently do, the prior consent of the court to the preferment of an indictment where there has been a committal for trial following a preliminary inquiry. Inappropriate cases may be met under our scheme with the intervention of the Attorney General or his agent after preferment or by the court's own inherent powers to control abuses of its process, and also through the court's statutory ability to refuse to issue process. We are not proposing to grant the private prosecutor the power to prefer an indictment directly where no preliminary inquiry has been held or where the accused has been discharged at a preliminary inquiry. The power to prefer an indictment directly is a prerogative of the Attorney General, one that is sparingly exercised and one which would be inappropriate as a general power exerciseable in the context of private prosecution.

The simple conclusion to which we have come in this Working Paper is that the private prosecutor ought, as nearly as possible, to enjoy the same rights as the public prosecutor in carrying his case forward. This proposition is not limited to the trial process alone, but in our view should be applied at the appeal stage as well. Practical inequalities exist which may be easily overcome by minor modifications to our law. The treatment of the private prosecutor under our law is an issue which perhaps does not fit neatly within the classic parameters of constitutionally protected equal rights. Nevertheless, we are of the view that the differential treatment which is presently countenanced in the procedural law which regulates appeals does result in the unequal status of certain individuals before the law and does confer unequal benefits of the law. The inequities which we perceive depend upon the nature of the prosecutor and the type of case which is to be pursued.

It should be noted that, presently, where the offence is indictable the Crown and the accused do not have identical rights of appeal. Under our law the Crown has considerably narrower rights of appeal than does the accused. The Crown may appeal against acquittal as of right where the ground of appeal is "a question of law alone," and against sentence, with leave of the court of appeal or a judge thereof, where the sentence is not fixed by law. We are not here advancing the suggestion that the Crown prosecutor's rights of appeal be generally extended. We are sensitive to the argument that the individual citizen should be protected, as far as possible, from facing a traumatic and protracted series of legal proceedings. We believe that there is substance in the argument that the granting of extremely broad powers of appeal to the Crown could result in possibly unjustifiable hardship for a defendant who had been acquitted in a previous criminal trial. Such a defendant would never know for sure whether the case was completely over until the rather lengthy appeal process had run its course. Instead, what we are recommending here is that the Crown prosecutor and the private prosecutor possess precisely the same rights of appeal. We see no basis for saying that in identical circumstances an individual should have no right to pursue an appeal whereas the Crown prosecutor should have an ability to proceed further and question an erroneous ruling of the trial court.

At the present time, appeals from summary trial conclusions *can*, as a result of the language of section 748 of the *Criminal Code*, be taken by a private prosecutor.

But no such power exists in relation to indictable proceedings. As discussed, there is an argument that this procedural arrangement is a reasonable compromise, that is: the private prosecutor has been able to take the case to trial; the accused is protected from being pursued further (so unwarranted harassment ceases); and the state's interest is protected by the Attorney General or counsel instructed by him being able to appeal the acquittal or sentence.<sup>132</sup>

We do not believe that the case based on compromise is a strong one. Since we believe in the desirability of retaining the right to prosecute privately, it seems to us both logical and proper that this right should be reinforced by the private prosecutor's being granted full status to pursue his case through the appeal stages in the absence of the Attorney General's intervention to carry the appeal forward.<sup>133</sup> This right of appeal could conceivably be linked to the introduction of appropriate changes to the *Criminal Code* concerning costs, but we wish to reserve our position on this aspect of the subject until we have completed our work on the specific area of costs.<sup>134</sup>

Section 621, which applies to appeals to the Supreme Court of Canada should also be amended in similar fashion so as to extend the rights the public prosecutor presently possesses to the private prosecutor in the absence of intervention by the Attorney General. While the changes that we propose result in relatively few direct amendments to the *Criminal Code*, their significance should not be underestimated.

## Recommendations

**1. The right to prosecute privately ought to be retained and extended to those elements of the trial and appeal process where they are presently proscribed or restricted.**

**2. As nearly as possible, the private prosecutor ought to enjoy the same rights as the public prosecutor in carrying his case forward. This proposition is not limited to the trial process, but extends to the appeal stage as well.**

**3. The right to lay an information and issue process in relation thereto ought to be unexceptional, subject as it presently is to the ordinary law which governs all cases.**

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132. See *Criminal Code*, s. 605.

133. An intervention by the Attorney General in order to stay an appeal would, in some circumstances, at least amount to an abuse of process.

134. Cost awards would be a deterrent to frivolous or malicious private prosecutions if the private prosecutor could be rendered personally responsible for the costs of the accused in appropriate situations.

4. The right to carry a charge forward to trial ought to be unexceptional and ought not to be affected by the private status of the prosecutor. Anomalous restrictions pertaining to indictable offences such as the obtaining of the consent of the court or of the Attorney General ought to be modified accordingly.

5. The right of the private prosecutor to appeal, whether acquittal or conviction, ought to be unexceptional and ought to be governed by the same rules as presently pertain to appeals generally. This recommendation includes appeals to the Supreme Court of Canada.

6. All of the foregoing recommendations are subject to the right of the Attorney General to intervene in any prosecution in order to carry the case forward, or stay the proceedings, or withdraw the charges.

7. The right of the Attorney General to prefer an indictment directly in the event of a discharge following a preliminary inquiry or in the absence of a preliminary inquiry ought to remain a prerogative enjoyed exclusively by the Attorney General and should not be available to a private prosecutor.





## APPENDIX

### An Historical and Comparative View of Private Prosecutions

#### 1. Introduction: The Evolving Role of the Prosecutor in English Law

The primary reason for embarking on comparative and historical studies is that one can examine the responses of different societies to the same broad social phenomena. The value of this to the law reformer is clear: since it is virtually impossible to accomplish a controlled experiment in "the law," the only way to gain perspective on different approaches to the law and its institutions is by studying our own past and that of other legal systems.

The main question of interest to us in this comparative exercise is whether, assuming the formal availability of a private prosecution mechanism, there is, in practice or in effect, an ideological commitment to the state control of such prosecutions. In civil law countries such as France and Germany, criminal law is inquisitorial in the sense that the state has appointed itself as both investigator and judge. In a sense, there is no prosecutor because the state authority is strictly on a fact-finding mission.<sup>135</sup> In England, on the other hand, prosecution is part of the criminal procedure, and private prosecution is guaranteed both by tradition and, since 1979, by legislation.<sup>136</sup>

It can be argued, of course, that for practical purposes prosecution by private interests is not now a viable option even in common law jurisdictions because in general terms, victims of crime do not have sufficient resources to engage in private prosecution. This argument, though it has statistical force, misses a basic point: far from being committed to state intervention in criminal prosecution, England and other common law jurisdictions have traditionally maintained a conservative, non-interfering stance towards the individual's right of private prosecution.<sup>137</sup> As well, the common law history shows that England has always used its traditional techniques and devices

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135. W.S. Holdsworth, *A History of English Law*, 5th ed. (1903, reprinted London: Sweet and Maxwell, 1966), Vol. 3, p. 622.

136. *Prosecution of Offences Act 1979*, c. 31, s. 4 (U.K.). See now, the *Prosecution of Offences Act 1985*, c. 23, s. 6(1) (U.K.).

137. One of the objectives of this Paper is to show that to the extent that the "right" of private prosecution exists it does so as a correlative to the limitation of legislative authority. Thus, as will be explained more fully elsewhere, although the *Prosecution of Offences Act 1979* appears to guarantee the private prosecution right, it actually limits it substantially.



in new ways in order to adapt to changing conditions. The significance of this historical pattern for Canada is clear: private prosecution not only goes back to the roots of the common law, but also it is an institution which, although it has fallen into relative disuse in recent times, may well have considerable potential and utility.

English law before the Norman Conquest was essentially adversarial, and disputes often wound up in physical battles.<sup>138</sup> As society developed, these early methods evolved into more civilized ones,<sup>139</sup> but the adversarial basis did not change. With the Conquest, whole new procedures came into existence, but what is significant is that the new techniques did not extinguish the old law, but were, as Holdsworth says, "... adapted to the old conception [of the law]."<sup>140</sup> Thus, although by the thirteenth century the normal trial procedure was presentment to the grand jury, indictment and trial by petty jury,<sup>141</sup> this newer procedure coexisted with the Anglo-Saxon "appeal" and summary procedure for criminals caught in the act. When a petty jury was called, it was made up of members of the local community. The legal rationale was that these citizens would be knowledgeable about the crime, and in fact, would describe what they had seen.<sup>142</sup> The jury members, in other words, were also the witnesses. This system required the victim, or a relative of the victim, to initiate the prosecution.

If the legal method of English law at that time was adversarial, then the end was compensation.<sup>143</sup> In other words, criminal acts were treated as tortious acts, requiring redress for the victim rather than punishment by the state. However, in 1106 and 1167 statutes were passed at the Assize of Clarendon and Northampton<sup>144</sup> which are now rightly regarded as the formal beginnings of the general machinery of criminal justice.<sup>145</sup> The legislation established trials by the Royal Justices for the serious crimes of theft, murder, robbery, forgery and arson, after presentment by local juries.

The trials were initiated by victims. Once a trial had gone to the King's Court, counsel were largely excluded.<sup>146</sup> Forensic argument and reasoning as well as evidentiary techniques were quite primitive and did not play an important role in court procedure.<sup>147</sup> The social problem at which the legislation was aimed was "certain

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138. J.F. Stephen, *A History of the Criminal Law of England* (1883, reprinted New York: Burt Franklin, 1964), Vol. 1, p. 60.

139. *Id.*, pp. 61-2.

140. Holdsworth, *supra*, note 135, p. 612.

141. *Id.*, p. 607.

142. J.H. Langbein, "The Origins of Public Prosecution at Common Law" (1973), 17 *Am. J. Leg. Hist.* 314.

143. J.M. Kaye, "The Making of English Criminal Law: (1) The Beginnings — A General Survey of Criminal Law and Justice down to 1500," [1977] *Crim. L.R.* 5.

144. H.W.C. Davis, ed., *Stubbs's Select Charters*, 9th ed. (1913), pp. 167, 178.

145. *Supra*, note 143, p. 5.

146. *Id.*, p. 10.

147. *Supra*, note 142, p. 317.

classes of offenders, notably thieves and robbers who, presumably having no money, were unable or unwilling to compensate" their victims.<sup>148</sup> For the good of the state such offenders had to be punished. However, strikingly, in practice not all the above crimes did result in punishment. For example, although the relative of a homicide victim could "appeal" a crime, thus bringing it to a Royal trial, frequently such victims would be bought off by the perpetrator of the crime. Although the Crown was aware of this practice, it was usually accepted. In other words, the new machinery was allowed to produce the old result of compensation.<sup>149</sup> The only major exception to this was the crime of theft.<sup>150</sup>

The significance of these developments is clear. Rather than re-ordering legal procedure, the legislation was integrated into the existing system. The state's concern with criminal punishment was balanced by the individual's concern with compensation. The tension between these two interests produced a compromise.

This early legislation was followed by other, more minor statutory changes, but the next legislation which had a major impact on prosecution procedure was the so-called Marian statutes of 1554 to 1555.<sup>151</sup> These statutes are considered by some historians<sup>152</sup> to be the origin of the public prosecutor role in English law. The discussion of the legislation is drawn extensively from Professor Langbein's methodical study of this period.<sup>153</sup>

Langbein's concern is to show that the Marian statutes were not the result of the direct adoption of Continental practices, but were rather measures reflecting English common law tradition.<sup>154</sup> He argues that the second statute, which is the most relevant for our purposes, was to provide a public aspect to the prosecution process, but not to institute a civil law "Inquisition."<sup>155</sup> Specifically, the statute was to deal with cases where there were no aggrieved citizens surviving to prosecute — or where their evidence would have to be forced in order to secure a conviction.<sup>156</sup> As can be imagined, the medieval jury/witness system could create prosecutory "gaps" in complicated crimes. Langbein states: "The public interest in law enforcement cannot allow such gaps, and the rest of the Marian committal statute was designed to close them."<sup>157</sup>

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148. *Supra*, note 143, p. 7.

149. *Id.*, p. 9.

150. *Ibid.*

151. Respectively: 1 & 2 Ph. & M., c. 13; and 2 & 3 Ph. & M., c. 10.

152. For example, see P.R. Glazebrook, "The Making of the English Criminal Law: (3) The Reign of Mary Tudor," [1977] *Crim. L.R.* 582; and Langbein, *supra*, note 142, p. 318.

153. J.H. Langbein, *Prosecuting Crime in the Renaissance: England, France and Germany* (Cambridge, Mass.: Harvard University Press, 1974).

154. *Id.*, p. 22. On this point he seeks to prove Holdsworth wrong.

155. *Ibid.*

156. *Id.*, p. 35.

157. *Ibid.*

There were four objectives in the statute: (1) the justice of the peace was to take an active role in investigations; (2) he was to organize a case for the prosecution; (3) he was to act as the prosecutor if necessary; and (4) he was to aid the assize judge by giving him a survey of the prosecuting case. Looked at in retrospect, this legislation gave power to the justice of the peace which evolved into something quite like present-day police powers and, indeed, was not repealed until legislation was enacted giving the police broad powers in the nineteenth century. However, the important point is that the legislation which created the public prosecutor was, like the earlier legislation, a corrective measure designed to shore up the existing system. The legislative intent was not to overturn private prosecution, but to supplement it.

The social forces at work which affected the Marian statutes and produced a role something like a public prosecutor also produced specific initiatives to reinforce the official position. In the late eighteenth century and throughout the nineteenth century such authorities as Patrick Colquhoun, the Select Committee of 1798, Jeremy Bentham and Edwin Chadwick all advocated a public prosecutor.<sup>158</sup> The concerns they had, as Radzinowicz describes, were many:

Almost the whole onus of prosecution rested upon the victim: his was usually the main burden of securing detection and pursuit and the services of the local constable were likely to depend on what reward he could offer. Referring to this burden, a contemporary observed that "in a great proportion of instances — in, probably, by far the majority of instances — where the injury is not of an atrocious sort, the injured person conceals it, and withholds complaint."

If the offender were caught, the victim had still to face the expense, the travelling and the loss of time involved in the cumbrous and protracted criminal procedure of the time, often with doubtful prospects of reimbursement, as well as the ordeal of giving evidence in one of the higher courts .... There is always a great gap between crime committed and crime detected and prosecuted. There can be little doubt that at this period it yawned very wide indeed.<sup>159</sup> [Footnotes omitted]

The legislation of 1879 creating the Director of Public Prosecutions<sup>160</sup> was also, like the earlier legislation, formulated as a corrective measure for specific concerns.

It is noteworthy that this legislation did not establish a general system of public prosecution, but rather was designed to act in cases which appeared to be of importance or difficulty or in which special circumstances, such as a person's refusal or failure to proceed with a prosecution, appeared to render the action of the Director of Public Prosecutions necessary to secure the due prosecution of an offender. As well, the Bill specifically stated there was to be no interference with private prosecution. The legislative history of the measure is complicated, but a good summary is provided by

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158. L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens, 1968), Vol. 3, p. 254.

159. *Id.*, Vol. 4, p. 68.

160. *Prosecution of Offences Act, 1879*, 42 & 43 Vict., c. 22 (U.K.)

Kurland and Waters.<sup>161</sup> On the one hand, the supporters of a public prosecution system were motivated by the concerns mentioned above, together with a fear of the possibility that individuals might use the criminal justice system for private vengeance (malicious prosecution). On the other hand, the opponents of public prosecution were concerned with rights of the individual: "The fault, if there is one at all, lies in the passion of the English people for personal freedom, and in their intolerance of personal restraint or interference for any purpose whatever."<sup>162</sup> As well, they had a cultural enmity (jealousy) towards Continental and American practices. The result was a compromise, a system, as Lord Cairns said, changed only to meet exceptional cases.<sup>163</sup> This Bill, like the earlier legislation, was essentially conservative. It was state intervention which refused to disturb the entrenched right, yet was aimed at correcting the problems associated with that right.

By the time that Canada enacted its *Criminal Code* in 1893, England clearly had a tradition of private prosecution. In this context, then, it might be asked, Does the *Criminal Code* demonstrate that Canadian society desires complete officialization of, or official control over, criminal procedure? The answer seems clearly to be "No." The *Criminal Code* is largely a statutory restatement of the traditional common law — and Canada remains largely a common law jurisdiction for criminal law purposes. However, this line of inquiry leads us to ask, Precisely what interests does the common law criminal system safeguard? Or, to put it differently, What is the relationship between the state and the primary actors (other than the offender) in Canadian criminal procedure? To consider this question, a closer examination of the differences between the common law and the civil law approaches to criminal procedure is necessary.

## 2. The Prosecutor in Civil Law Systems

### (a) General

When a crime occurs, at least two sets of interests have been disturbed: the state's and the victim's. Both civil law and common law jurisdictions reserve a place for both sets of interests to be involved in the criminal process. The difference is that the civil law system is historically based on the state's interest, whereas the common law system is historically based on the interest of the victim of the criminal act.<sup>164</sup> In civil law jurisdictions, once the crime has been reported the judge (and/or jury) is involved in a rational process of inquiry. The "prosecutor" as a representative of the state, is more concerned with finding the truth than presenting the victim's view of the facts. The question of the victim's rights in this process is really quite peripheral. There is a role for him to play, but his interest is not fundamental to the teleology of the procedure.

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161. P.B. Kurland and D.W.M. Waters, "Public Prosecutions in England, 1854-79: An Essay in English Legislative History," [1959] *Duke L.J.* 493.

162. Cited in *id.*, p. 562.

163. *Id.*, p. 558.

164. What comprises the victim's "interest" will be discussed below.

On the other hand, historically in the common law the victim had an essential role to play in the procedure — both initially and thereafter. The common law criminal trial still involves an argument between parties: in this way it is the same as a civil (tort) dispute. Civilian criminal procedure, it scarcely needs repeating, is an inquiry into the facts, not an argument. In order to highlight this difference, a brief history of French criminal procedure will be outlined. France serves as an example and is probably also the most influential civil law system.<sup>165</sup>

## (b) France

Criminal law in France in the medieval period was based on the ordeal and trial by battle.<sup>166</sup> As in England, these methods were gradually felt to be unacceptable, but in France the legislative change occurred a century later than in England, in 1258.<sup>167</sup> By this time a Germanic “folk-judgment” procedure was widely used in France. This system, as Dawson points out,<sup>168</sup> was later to provide the kernel of the English jury system. “The opportunity thus existed for France to emulate England’s jury system. However, rather than follow England’s lead, the French royalty passed legislation which implicitly adopted the ‘Roman-canonist’ system of proof by individual witnesses.”<sup>169</sup>

The actual measure was the *Ordonnance Royale* of Louis IX which abolished the judicial duel in royal courts. The effect of this measure was to create a vacuum; if there were no duels, some other criminal procedure had to be used. The question of why the French system evolved as it did is complicated and peripheral to our concerns and consequently will not be dealt with here. However, if the precise reasons for the particular historical choices are difficult to ascertain, the main quality of the new procedure is not. The Roman-canonist system was more rational than dueling or drawing together six to twelve men to extract a confession.<sup>170</sup> The new system had

[d]efinite ideas not only about who should conduct the criminal process, but about how he should go about it. For *instruktionsmaxime* is primarily concerned with the nature of judicial proof. In contradistinction to the nonrational proofs of ancient Germanic law, it represents the view that the object of criminal procedure is to permit a judgment to be made about the authorship of criminal acts, based upon a rational inquiry into the facts and circumstances.<sup>171</sup>

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165. See D.M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), pp. 222-3.

166. M. Ploscowe, “The Development of Present-Day Criminal Procedures in Europe and America” (1935), 48 *Harvard L.Rev.* 440.

167. *Supra*, note 153, p. 211.

168. J.P. Dawson, *A History of Lay Judges* (Cambridge, Mass.: Harvard University Press, 1960), p. 44.

169. *Ibid.*

170. *Supra*, note 153, p. 214.

171. *Id.*, p. 131. In this context Langbein also points out that the English emphasis on rationality is actually a recent development of criminal evidence which was sporadic into the eighteenth century. “The trial judge had been the sudden successor to the ordeals. ‘Like the ordeals the jury also was inscrutable’”: T.F. Plucknett, *Edward First and Criminal Law* (New York: Cambridge University Press, 1960), p. 75, quoted in Langbein, *supra*, note 153, pp. 132-3.



These Roman-canonist concepts did not, of course, become accepted immediately. The period from the thirteenth century to the *Ordonnance Royale* of 1539 is the time when the new French criminal procedure became consolidated. The innovations clearly did not immediately stop private initiation of prosecution. However, by the fourteenth century:

A lengthy series of ... statutes isolated the public interest in criminal prosecution and assigned its superintendence to the *procureur*. He was authorized to invoke the criminal process when there was no private complainant; his motions instigated judicial action and propelled the procedure through subsequent stages.<sup>172</sup>

Thus, as in England, state intervention into criminal proceedings (although in England the concept is one of minimal intervention) came about partially because of failure to prosecute all crimes. However, in France the public prosecuting authority, although given great power, was not immediately able to enforce completely the doctrine of officialized procedure. Thus, even beyond the sixteenth century there was a version of criminal legislation which actually was a civil procedure. This was the “‘ordinary,’ as opposed to the ‘extraordinary’ (inquisitorial) procedure.”<sup>173</sup> The concept dated back to the late thirteenth century when judicial examination of witnesses was accepted, but complete official prosecution — “public instigation of charges and discovery and production of witnesses”<sup>174</sup> — was not. In this situation:

The suspected person consented to judicial examination and to binding adjudication on a roughly civil standard of proof. In return he was allowed liberal defense, again of a civil standard, including the aid of counsel and immunity from torture.<sup>175</sup>

This kind of uneasy compromise between civil and criminal practices lasted until France gained the requisite judicial and political resources to maintain complete official prosecution. The procedural implications of the officialization will be detailed below, but the following point should again be emphasized. French criminal law history at this time was a process of consolidating officialized prosecution. The result of that process was the emphasis of the state’s interests and the concomitant de-emphasis of the interests of other participants.

Another result of the growing acceptance of the Roman-canonist procedure was the diminished role of lay judges. At the time that the new system started being used in France, the lay judge had an established role, as in England. However, as the inquisitorial procedure gained acceptance, “especially its modes of investigation and proof,”<sup>176</sup> it became more and more complex, driving out the lay judge.<sup>177</sup> More

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172. *Supra*, note 153, p. 217.

173. *Ibid.*

174. *Ibid.*

175. *Id.*, p. 218.

176. *Supra*, note 168, p. 68.

177. *Ibid.*

extensive and sophisticated techniques called for more complete records; and with more complete records came a requisite demand for skill — this in an age when the ability to read was rare enough. Of course, as Dawson points out, at that level of sophistication oral records became mistrusted: “Each element of the system reinforced the rest.”<sup>178</sup> An illustration of the relative complexity of the French system at this time is provided by a comparison between two treason cases, one in France in 1504-6 and one in England in 1509. The prosecution of Maréchal de Gie yielded a report of over six hundred pages, whereas *Empson and Dudley's Case* comprises two sides of a printed page in the *State Trials* reports.<sup>179</sup>

French criminal procedure became codified in a series of statutes around 1539.<sup>180</sup> This legislation consolidated the Roman-canonist system and it remained extant until the late eighteenth century and the French Revolution. Accordingly, as the inquisitorial method took hold, it developed a bureaucracy which became more and more specialized and complex. The result of this process was a highly developed, very rational system. Harold Berman summarizes the French system and contrasts it with the English one as follows:

[T]he two systems acquired many of the contrasting features that have continued to characterize them in the twentieth century. The French system came to rely heavily on written procedure, the English on oral procedure; the French relied on hundreds of highly trained professional judges, the English on lay jurors and lay justices and only a very few professional judges; the French on judicial interrogation of parties and witnesses under oath, the English on accusation and denial by the opposing parties with resolution by the jury. With regard to substantive law, French royal law was more systematic, more learned, more Roman, more codified while English royal law was more particularistic, more practical, more Germanic, more orientated to case law.<sup>181</sup>

The goal of the French system was to establish rational, even empirical proof. Even convincing the judge was in a sense secondary,<sup>182</sup> because the proof was to be objectively verifiable. What then was the process by which such proof was to be obtained? The process could be initiated *pro forma* by a private citizen, but after that it was in the hands of officials. There were very detailed rules drawn up regarding the weighing of evidence.<sup>183</sup> The most substantial proof was a corroborated confession or two eyewitnesses. Because the accused's rights were not an important issue, torture was frequently used to hasten the process of justice. Evidence was admitted to the court in the form of written dossiers. There were seven judges, who saw no witnesses but dealt only with the written evidence. The accused first saw the evidence in this

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178. *Id.*, p. 60.

179. *Supra*, note 153, p. 221.

180. *Id.*, p. 210.

181. H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), p. 478.

182. K.H. Kunert, “Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of ‘Free Proof’ in the German Code of Criminal Procedure” (1966), 16 *Buffalo L.Rev.* 122, p. 144.

183. *Id.*, pp. 144-5.



written form at the trial. It was unlikely that witnesses would change their evidence after the accused's argument, not in the least owing to fines for perjury.<sup>184</sup> The system throughout was bureaucratic and secretive.

If the Roman-canonist system were in use in France today, the distinction between France and England would be very clear. In that situation, a French jurist would regard private prosecution as being totally alien to the inquisitorial procedure, a throw-back to a more barbaric age. However, French criminal legal procedure has changed radically since the late eighteenth century. Specifically, in 1789, the French Revolution occurred. One immediate and short-lived effect was a drastically altered criminal procedure: there was to be a public trial with jury, a counsel for the defence and the old system of legal proof was abolished:

The value of evidence ceased to be fixed in advance, and all that was demanded of the jury was that its decision be based upon an inner conviction (*conviction intime*) reached as a result of evidence presented in open court.<sup>185</sup>

The implications of this change were, indeed, revolutionary. However, the changes were too drastic for the prevailing social conditions; they gave too much protection to the accused, and the system partially regressed to the criminal procedure of the *ancien regime*. The Napoleonic *Code d'instruction criminelle* was a compromise between the earlier system and the influence of the English system.<sup>186</sup> It established two stages: first, an investigation by a *juge d'instruction* with the accused represented by counsel;<sup>187</sup> second, if the first stage established the accused's likely guilt, in open jury trial.<sup>188</sup> The first or preliminary stage was the product of pre-revolutionary influence; the second was the product of English influence.

These changes to the old criminal procedure reforms were attempts to make this system less secretive and officialized. Yet, although a lay element was introduced at the last stage of the proceedings, it is clear that the pre-revolutionary emphasis on rationality even today has a powerful effect. As Berman suggested above, the characteristics of the system in the fourteenth century are still present in the twentieth century.

The procedure defined in the Napoleonic Code changed little until 1958, and the changes are not fundamental to this analysis. Two questions then can be asked. First, what role do private interests play in modern French criminal procedure, and second, what relationship does that role have to the historical development of the system? The answer to the first question is straightforward. The victim of a crime has three functions

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184. Ploscowe, *supra*, note 166, p. 451.

185. *Id.*, p. 461.

186. *Id.*, p. 462.

187. The right to counsel is now available. See R. David, *English Law and French Law* (London: Stevens, 1980), p. 65.

188. Ploscowe, *supra*, note 166, p. 462.

in the system. First, he reports the crime. Second, he can join in the trial as a civil party. He can, in other words, sue for compensation during the criminal action. Third, if the public prosecutor (*le procureur de la République*) elects not to prosecute, then the victim can:

... notwithstanding the decision of non-prosecution, bring the matter before the examining magistrate or the trial court by means of a civil party complaint (*constitution de partie civile*). The bringing of the civil action triggers the public action. Thus it is clear that the state's attorney (*procureur*) is not completely in control of the public action in that he cannot extinguish it either by settlement or by refraining from prosecution.<sup>189</sup>

The second question can now be addressed: If French victims can initiate public action even though the public prosecutor has decided against it, how does this power relate to the tradition of the French criminal legal system? We have seen that France has a history of bureaucratic, officialized procedure. Although changes after the Revolution tempered that tradition, the element of officialization remains very strong. Where does the victim's interest fit in? Clearly, the protection of the victim's interest must be seen as an example of the humanizing reform that occurred after the Revolution. Private prosecution is not conducive to "rationality" in the criminal system and it certainly is not part of a state-organized bureaucracy. It exists rather as a counter to those forces, as a safeguard. It is a concession to the belief that the victim's rights need more recognition than the mere ability to report a crime or sue for damages. As Langbein points out, that recognition has achieved a significant status:

If the public prosecutor does not initiate *l'action publique*, the *partie civile* may do it himself, ostensibly in order to provide the necessary basis for his parasitic damages claim. What in fact results is akin to private prosecution. The use of this procedure has grown enormously in the present century on account of what Americans would call a relaxation of standing requirements. Trade unions, policemen's associations, and numerous other juristic persons have been allowed to deem themselves "victims" of crimes committed against their members. Consequently, when the French prosecutor decides not to prosecute, he decides for himself and his office alone.<sup>190</sup>

The fact that the private prosecution interest has become part of a legal system so philosophically and historically removed from our own is striking and, it is suggested, instructive.

### (c) Germany

Germany is a civil law jurisdiction with characteristics different from both France and England. Specifically, there is only very limited private prosecution in Germany, but the private interest is recognized in other ways. To understand the system, some background should be provided.

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189. R. Vovin, "The Role of the Prosecutor in French Criminal Trials" (1970), 18 *Am. J. Comp. L.* 489.

190. J.H. Langbein, *Comparative Criminal Procedure: Germany* (St. Paul, Minn.: West Publishing, 1977), p. 88, footnote.

Germany up to the 1840s had a strong inquisitorial criminal procedure in which the judge both investigated and adjudicated. In 1848 the system was reformed by separating the adjudicating and prosecuting roles, a separation that is still established today.<sup>191</sup> The prosecutor, much as the *juge d'instruction* does in the French preliminary examination, decides if there is enough evidence to go to trial. Once at trial, the judges, made up of lay members and professionals, handle most of the questions.<sup>192</sup> The prosecuting role was not given to the victim because it was felt that private prosecution would detract from "the accustomed thoroughness of criminal justice under the inquisitorial system."<sup>193</sup> The public prosecutor was envisaged as "the watchman of the law;"<sup>194</sup> he was not just to press criminal charges but to gather evidence for both sides.<sup>195</sup> The most significant guarantee that the prosecutor will pursue justice is the *Legalitätsprinzip* — the legality principle or, as Langbein translates it, compulsory prosecution: "[The prosecutor] is obligated, unless otherwise provided by law, to take action against any activities which may be prosecuted and which are punishable in a court of law, to the extent that sufficient factual particulars may be obtained."<sup>196</sup> The legality principle, in other words, forces the prosecutor to prosecute where there is sufficient evidence.

The problem with the legality principle is obvious. If all potential criminal cases were prosecuted, the criminal system would slow down and eventually falter from overuse. Thus, as one would expect, the German criminal procedure has certain exceptions to compulsory prosecution. However, these exceptions and the way in which "normal" compulsory prosecution cases are handled bring up again the question of protecting the private interest. To be specific: Are there devices to ensure that the prosecutor follows the rule of compulsory prosecution, where it is required? Moreover, if there are exceptions to compulsory prosecution, are there also safeguards preventing prosecutors from abusing their discretion? In the remainder of this section, the relevant German criminal procedure will be outlined to show what place the private interest has in that system.

There are three classes of offences in Germany: petty infractions, misdemeanours, and felonies and serious misdemeanours. All three have different procedures and have different prosecution requirements.

Petty infractions basically are comprised of traffic violations and economic and public regulatory activity.<sup>197</sup> Compulsory prosecution does not apply to petty infractions as the traffic police or other enforcement agency prosecutes the offence.

191. J.H. Langbein, "Controlling Prosecutorial Discretion in Germany" (1974), 41 *U. Chi. L.Rev.* 439, p. 442.

192. *Id.*, p. 447.

193. H.H. Jescheck, "The Discretionary Powers of the Prosecuting Attorney in West Germany" (1970), 18 *Am. J. Comp. L.* 508.

194. Savigny, quoted in Langbein, *supra*, note 191, p. 449.

195. *Ibid.*

196. *Strafprozessordnung*, ss. 151, 152 II, quoted in Jescheck, *supra*, note 193, p. 509.

197. *Supra*, note 191, p. 451. The code is the 1968 *Gesetz über Ordnungswidrigkeiten*.

Misdemeanours under German law include larceny, embezzlement, fraud, extortion, receiving stolen goods, forgery, negligent homicide, abortion, and dangerous driving, among others.<sup>198</sup> The relevant rule here is the *Opportunitätsprinzip*, which is the principle of expediency or advisability: “[T]he public prosecutor may refrain from prosecuting with the consent of the court competent (to try the case), if the guilt of the actor would be regarded as minor (*gering*), and there is no public interest in prosecuting.”<sup>199</sup> Although this procedure is available, the number of terminations is actually quite small.

[P]rosecutors regard compulsory prosecution and restraint of discretion as overriding principles. They generally agree that they should be reluctant to exercise their discretionary power, and they abort proceedings only in really trivial cases.<sup>200</sup>

It should be noted that the prosecutor also has other choices about how to proceed with the prosecution. For example, he could deal with the accused in a manner appropriate to the accused’s conduct after the crime.<sup>201</sup> Thus, if an accused donated a sum of money to a charity after committing a minor crime, it could result in non-prosecution. Or, after a crime, the prosecutor could issue a penal order with a fine, rather than have the case go to court.<sup>202</sup> The accused could, if he disagreed, require that the case be tried. Both these methods are only utilized with fairly minor crimes and fairly minor sanctions.

The most dangerous crimes are, of course, felonies and serious misdemeanours. The rule for felonies, such as murder, rape, robbery, perjury and arson is quite simple — they are prosecuted if there is sufficient evidence.<sup>203</sup> If prosecutors do not prosecute, having sufficient evidence, they can be charged with “favouritism,” but such charges are quite rare.<sup>204</sup>

The point is made by Herrmann that the German prosecutor generally wants to put criminal proceedings before the judges, if there is need.<sup>205</sup> It is significant then for our purposes that, despite stressing compulsory prosecution for serious crimes, there is as well other machinery recognizing the private interest. There are three separate devices protecting this interest.

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198. J. Herrmann, “The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany” (1974), 41 *U. Chi. L.Rev.* 468, p. 484.

199. EGStGB: Code of Criminal Procedure, s. 153, cited in Langbein, *supra*, note 191, pp. 458-9.

200. *Supra*, note 198, p. 484.

201. *Supra*, note 191, p. 460.

202. *Id.*, p. 456.

203. *Supra*, note 193, p. 509.

204. *Supra*, note 198, p. 476.

205. *Id.*, pp. 472-3.

Firstly, for certain misdemeanours private prosecution is possible. There are eight of these:

trespass to domestic premises, insult, inflicting minor bodily injury, threatening to commit a crime upon another, unauthorized opening of a sealed letter or document, inflicting property damage, patent and copy right violations, and crimes prescribed by the unfair competition statute.<sup>206</sup>

The citizen can prosecute whether or not he has asked for public prosecution, but if the public prosecutor decides to prefer charges, that is, if it is in the public interest, then the public prosecutor takes over primary responsibility for the case.<sup>207</sup> It should be observed that, unlike France, Germany has kept the standing interest narrow. Along with these eight, there are other misdemeanours which cannot be prosecuted without a formal demand from the victim: "The offences consist mainly of intra-family trespasses (excluding the very serious ones such as incest), where criminal sanctions may do more harm than good; and minor injuries to property, person and dignity ...."<sup>208</sup>

The second remedy for citizens is administrative and judicial review, the *Klageerzwingungsverfahren*, which Langbein calls "a mandamus action for a judicial decree to require the prosecutor to prosecute."<sup>209</sup> Anyone can make a formal demand for the public prosecutor to prosecute. If he does not prosecute, he explains why to the complainant but the victim alone can bring the mandamus action. The State Supreme Court has original jurisdiction<sup>210</sup> and the remedy is not available in non-prosecution of misdemeanour cases because, theoretically, the decision not to prosecute has judicial consent.<sup>211</sup> However, as Langbein states, such consent is usually a formality.<sup>212</sup> The result is that only felonies and serious misdemeanours, those crimes requiring "compulsory" prosecution, are protected by mandamus. Peters is quoted as stating: "Successful *Klageerzwingungsverfahren* occur in practice with the most extreme rarity. Nevertheless, the possibility of a *Klageerzwingung* is of great importance, in that it imposes a flat rule against improper and illegal considerations."<sup>213</sup>

Part of the reason for this rarity of the mandamus action is because departmental complaint processes precede it. The third device protecting the private interest is that citizens may lodge a departmental complaint against the prosecutor for any crime, misdemeanour or felony. This remedy, the so-called *Dienstaufsichtsbeschwerde*, is not part of the Code of Criminal Procedure, but is derived from a principle of "German

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206. *Supra*, note 191, pp. 461-2.

207. *Id.*, p. 462.

208. *Id.*, p. 463.

209. *Ibid.*

210. *Id.*, p. 464.

211. *Supra*, note 198.

212. *Supra*, note 191.

213. *Id.*, pp. 464-5.



administrative law that the citizen is entitled to file a complaint against a public employee's neglect of duty or abuse of power.''<sup>214</sup> The Prosecutor-General thus can rule on how a public prosecutor handled a case. It is suggested that because citizen complaints are not conducive to a successful prosecuting career, the departmental complaint is a very effective safeguard of private interests.

It can be seen that the German system has a strong respect for the rights of the victim. It is dangerous, of course, to draw lessons from a criminal legal system so philosophically removed from our own. But this much, perhaps, can be said: Germany, like France, recognizes the private interest in its criminal procedure, if only indirectly. This suggests that the private interest is one that transcends the ideologies of major legal systems.

### 3. The Common Law Jurisdictions Today

Having examined private prosecutions in two civil law jurisdictions, we now turn our attention to the situation in other common law locales. How have Australia, New Zealand, the United States and contemporary England, among others, approached this problem? Also of interest is the approach adopted in Scotland.

#### (a) Scotland

The Scottish system is quite unlike the English and Canadian.<sup>215</sup>

The right and duty of public prosecution in Scotland lies not in the hands of the police, nor of the private prosecutor (subject to a minor qualification), but in the hands of the Lord Advocate, who discharges the responsibilities of his important office through the medium of Crown Counsel and the Crown Office. It is the Crown Office which in turn controls the Procurators Fiscal who are the Crown Prosecutors in the Sheriff Courts and the agents of the Crown Office in the investigation of crime, under the supervision of Crown Counsel ... The ancient right of a citizen to seek leave, with the concurrence of the Lord Advocate, to institute a private prosecution himself<sup>216</sup> when his own personal interests are directly affected, has not been formally abolished ... but that right has not been successfully invoked for over 60 years and today such applications are practically unknown.<sup>217</sup>

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214. *Id.*, p. 466.

215. See: the Justice Report, *supra*, note 107; Lord Cameron, *supra*, note 112; *Report of Working Party of the Public Prosecutions in Northern Ireland* (1971), Government of Northern Ireland, Appendix C; W.G. Normand, "The Public Prosecutor in Scotland" (1938), 54 *L.Q.R.* 345.

216. This is the minor exception referred to in the extract, although the *Report of the Working Party on Public Prosecutions in Northern Ireland*, *id.*, p. 56, Appendix C (III), did note that:

The main practical exception to [the absence of private prosecutions] is that certain statutes confer the right to prosecute for breaches of the statute on private bodies (and private individuals) concerned; but, even in these instances, the concurrence of the public prosecutor of the court is required if the breach is punishable by imprisonment without the option of a fine, unless the statute otherwise provides.

217. Lord Cameron, *supra*, note 112, pp. 3-4.

Whether or not the Scottish criminal justice system had a place for the private prosecutor was finally resolved in a dramatic application to the High Court for what was described as a "Bill for Criminal Letters" in 1982. This was the infamous *Glasgow Rape Case* where a young woman had been brutally attacked, disfigured and raped by several young men and the Lord Advocate had declined to prosecute them.<sup>218</sup> Her application to prosecute them privately was granted by the High Court and they were subsequently convicted.

It is this highly centralized system that removes investigative (police) functions entirely from the prosecution role that appealed to the framers of the Justice Report.<sup>219</sup>

#### (b) *New Zealand, Australia, and the United States*

In New Zealand, as in Canada, the private prosecutor role is recognized to a certain extent.<sup>220</sup> In New South Wales, Australia, on the other hand, the prosecutions in superior courts are conducted by Crown prosecutors<sup>221</sup> and Victoria has created a Directorate of Public Prosecutions.<sup>222</sup>

In the United States,<sup>223</sup> the private prosecutor has virtually no formal role to play in the criminal justice process at all. In that country, private prosecutions on the English model were rejected by the colonial settlers, particularly after the War of Independence<sup>224</sup> and at the state level county prosecutors were appointed, evolving into the district attorney system which today is largely an elective office. Prosecution at the federal level also developed along these lines until the Civil War when a process of centralization occurred.<sup>225</sup> All federal attorneys were placed under the supervision of the Attorney General who was now the head of the Justice Department.

218. R. Harper and A. McWhinnie, *The Glasgow Rape Case* (London: Hutchinson, 1984). See Appendix.

219. *Advisory Committee on the Police in Northern Ireland 1969*, Cmnd. 535 (London: HMSO, 1969), para. 142, p. 34.

220. See section 37 of the *Summary Proceedings Act 1957* (N.Z.), and section 345 of the *Crimes Act, 1961* (N.Z.).

221. R.R. Kidston, "The Office of Crown Prosecutor (More Particularly in New South Wales)" (1958), 32 *Aust. L.J.* 148. However, other states in Australia have different systems. In Queensland, for example, private prosecution by leave of the court is possible. See R.F. Carter, *Criminal Law of Queensland*, 3rd ed. (Sydney: Butterworth, 1969), p. 652.

222. *Director of Public Prosecutions Act, 1982* (Aust.). See "Note" (1984), 58 *Aust. L.J.* 3-5.

223. See the *Administration of Criminal Justice in the United States* (Am. Bar Foundation, 1955), pp. 84-8; Comment, *supra*, note 93; B.A. Grosman, *The Prosecutor* (Toronto: University of Toronto Press, 1969), pp. 13-4; *Report on the Office of the Attorney-General* (National Association of Attorneys General, 1977), pp. 11-22.

224. Public prosecutions there originated in a Connecticut enactment of 1704 setting up Queen's Attornies to prosecute in the county courts. This served as a paradigm for other states and was supported by the French model in terms of influencing which of the alternatives to choose: *Administration of Criminal Justice in the United States, id.*, p. 85. See also: P.S. Hudson, "The Crime Victim and the Criminal Justice System: Time for a Change" (1984), 11 *Perspective L.Rev.* 23; and Gittler, *supra*, note 119. Recently some exceptions to the general exclusion have begun to appear: see Gittler, *id.*, p. 151, footnote 112.

225. *Ibid.*



Thus, the formal role of the private individual in the American criminal justice system has been largely confined to that of complainant. This has led to considerable criticism, particularly where the public prosecutor has refused to prosecute.<sup>226</sup>

(c) *Contemporary England*

As we have seen, private prosecution was clearly available in England up to the 1870s. Indeed, private prosecution as a right was not greatly influenced until 1908.<sup>227</sup> However, since that time there has been a steady erosion of that right, and it is fair to say now that it is more one of appearance rather than of substance.<sup>228</sup> There exists today three distinct limitations on private prosecution in England:

(1) The historical limitation of *nolle prosequi* by which “proceedings upon an indictment pending in any court may be stayed ... at any time after the bill of indictment is signed and before judgement.”<sup>229</sup> This power has been available to the Attorney General since the sixteenth century.<sup>230</sup>

(2) There has been a growing number of statutes regarding various offences which require the consent respectively of the Attorney General, the Director of Public Prosecutions, or the official body dealing with the offence in question in order to launch a prosecution. For a list current to 1979 see the Royal Commission on Criminal Procedure, *Prosecutions by Private Individuals and Non-Police Agencies*, Appendix F.<sup>231</sup>

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226. Recent American commentators focus on the problem of prosecutorial discretion (plea bargaining, and so forth) and it is generally conceded that a definite problem, or potential for a problem, exists. Because of the historical background of the American system, private prosecution is not generally considered a viable solution, although in *supra*, note 93, it is pointed out that thirty states used private attorneys to assist the public prosecutor.

As an example of the difficulty of that problem, John Langbein and Lloyd Weinreb engaged in a debate with Abraham Goldstein and Martin Marcus which ranged over the 1978-79 issues of the *Yale Law Journal* regarding the question of whether the Continental criminal procedure had anything to teach the United States. Both sets of authors agreed that a “persistent, deep dissatisfaction with criminal justice” in the United States had caused investigators to look abroad, but they had deep disagreements over the results. Langbein and Weinreb feel that Continental practices can be helpful as a comparison, *after* the differences are established ((1978), 87 *Yale L.J.* 1549, pp. 1568-9). Goldstein and Marcus concluded that the differences among the systems in Germany, France and the United States are not significant in practical terms because, while on the surface the Continental system is missing parts the American system has, actually other parts of the system “fill in” to make the two systems quite similar (*id.*, p. 1573). The two different conclusions stem from different analyses.

227. Hay, *supra*, note 91.

228. *Id.*, pp. 180-1. Hay argues that private prosecution may still have some “constitutional” significance in England. This view is based primarily on the large number of groups which support private prosecution.

229. J.F. Archbold, *Pleading, Evidence and Practice in Criminal Cases* (London: Sweet and Maxwell, 1969), para. 142.

230. *Supra*, note 165, p. 883.

231. Royal Commission on Criminal Procedure, *supra*, note 10.

(3) In 1908 a distinct change in legislation took place: "[O]nly in 1908 did it become possible for the Director of Public Prosecutions to assume a private prosecution and then drop it, with no recourse for the private prosecutor."<sup>232</sup>

This ability of the Director of Public Prosecutions to intervene in a proceeding to stop it, has been affirmed by case-law in *Gouriet v. Union of Post Office Workers*,<sup>233</sup> *Turner v. Director of Public Prosecutions*<sup>234</sup> and, most recently, *Raymond v. Attorney-General*<sup>235</sup> reflecting recent statutory developments:<sup>236</sup>

[T]here may be what appear to the Director substantial reasons in the public interest for not pursuing a prosecution privately commenced .... The Director, in such a case, is called upon to make a value judgment. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot, in our opinion, be impugned. The safeguard against an unnecessary or gratuitous exercise of this power is that by section 2 of the Act [of 1979] the Director's duties are exercised "under the superintendence of the Attorney-General." That officer of the Crown is, in his turn, answerable to Parliament if it should appear that his or the Director's powers under the statute have in any case been abused.<sup>237</sup>

This case suggests that, unless the court feels that the Director's decision is manifestly dishonest or unreasonable, the decision is only reviewable by Parliament. In other words, for the most part, the courts are powerless to intervene.

In 1981, the Royal Commission on Criminal Procedure<sup>238</sup> reported that private prosecution in England was significant only in shoplifting and common assault cases.<sup>239</sup> Neither type of offence was numerically very large, and it concluded, in a different volume, that:

Prosecutions by private citizens other than in these cases are very rare indeed and scarcely seem a sufficient base to justify the position of the great majority of our witnesses who argue in one way or another that the private prosecution is one of the fundamental rights of the citizen in this country and that it is the ultimate safeguard for the citizen against inaction on the part of the authorities.<sup>240</sup>

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232. Hay, *supra*, note 91, p. 179.

233. [1977] 1 All E.R. 696 (C.A.).

234. (1978), 68 Cr. App. R. 70.

235. (1982), 2 W.L.R. 849.

236. *Prosecution of Offences Act 1979*, c. 31, s. 4 (U.K.).

237. *Raymond v. Attorney-General*, *supra*, note 235, pp. 854-5, *per* Sir Sebag Shaw.

238. Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure*, Cmnd. 8092-1 (London: HMSO, 1981).

239. *Id.*, p. 61.

240. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (London: HMSO, 1981), p. 160. See also B.M. Dickens, "Control of Prosecutions in the United Kingdom" (1973), 22 *Int. & Comp. L.Q.* 1.

One of the main reasons for this limitation, along with the other factors already alluded to, is the cost of the proceedings for a private prosecutor.<sup>241</sup> The Commission recommended, therefore, that to have private prosecution “retained as an effective safeguard against improper inaction by the prosecuting authority,”<sup>242</sup> and to keep citizens from the risk of “malicious, vexatious, and utterly unreasonable prosecution,”<sup>243</sup> a new system was needed with different financial underwriting. This suggested new procedure is summed up in a 1983 government White Paper:<sup>244</sup>

[P]rivate prosecutors should first apply to the Crown prosecutor to take up the case and, if the latter refused, be required to obtain the consent of a magistrate’s court for the prosecution to proceed (which it would then do at public expense).<sup>245</sup>

In the same White Paper the English government refused to change the system regarding private prosecution, stating that it saw “no sufficient justification for imposing this restriction on the right of private prosecution.”<sup>246</sup> The paper went on to say that there was no adequate reason for private prosecution to be funded by the public, although the 1981 Royal Commission *Report* had stated that the apparent right was actually severely restricted by financial necessity and statutory requirements. The result seems to be that private prosecution in England will remain a right, but a largely ineffectual one.<sup>247</sup>

Today in England, the framework of public prosecution is being transformed in a manner more significant than anything that has transpired in the past 700 years. Until recently the words of Sir James Fitzjames Stephens would have remained apt:

In England, and, so far as I know, in England and in some English colonies alone, the prosecution of offences is left entirely to private persons or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons.<sup>248</sup>

The forthcoming implementation of the *Prosecution of Offences Act 1985* will mean that a large part of the decision making on prosecutions will be transferred into the hands of legally qualified members of the Crown Prosecution Service which will be headed by the Director of Public Prosecutions under the ministerial responsibility of the

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241. Royal Commission on Criminal Procedure, *id.*, p. 161.

242. *Ibid.*

243. *Ibid.*

244. *Supra*, note 113.

245. *Id.*, para. 11.

246. *Ibid.* The system of public prosecution, as opposed to private prosecutions, is in the process of being dramatically altered as a result of the recent passage of the *Prosecution of Offences Act 1985*. For a complete discussion of “The New Prosecution Arrangements” see the articles contained in [1986] *Crim. L.R.* 1-44.

247. See A. Samuels, “Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals,” [1986] *Crim. L.R.* 33, p. 43.

248. *Supra*, note 138, Vol. 1, p. 493.

Attorney General. Public prosecutions, therefore, will be profoundly affected by the new arrangements but private prosecutions will remain largely undisturbed by the new initiative.

Accordingly, it can be safely asserted that today in England (as is the case in Canada) there is an ideological commitment towards retention of private prosecution, subject to an overriding power, vested in the state, either through the Attorney General or Director of Public Prosecutions, to intervene and stop the process or take over the prosecution itself.













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CRIMINAL LAW

# private prosecutions

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